No. 85-1233 (4)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

INTERNATIONAL PAPER COMPANY,

Petitioner,

v.

HARMEL OUELLETTE and LILA OUELLETTE, CLIFTON BROWNE and EDLA BROWNE, ALDEE PLOUFFE and SHIRLEY PLOUFFE, individually, on behalf of themselves, and on behalf of all similarly situated plaintiffs, H. VAUGHN GRIFFIN, SR., ARDATH GRIFFIN, ALAN THORNDIKE and ELLEN THORNDIKE, WESLEY C. LARRABEE and VIRGINIA LARRABEE, F. ALFRED PATTERSON, JR., and LOIS T. PATTERSON,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

ROY L. REARDON*
ALBERT X. BADER, JR.
SIMPSON THACHER & BARTLETT
(a partnership which includes professional corporations)
One Battery Park Plaza
New York, New York 10004
(212) 483-9000

DINSE, ERDMANN & CLAPP
209 Battery Street
P. O. Box 988
Burlington, Vermont 05402
(802) 864-5751
Counsel for Petitioner

PETER F. LANGROCK*
EMILY J. JOSELSON
LANGROCK SPERRY PARKER & WOOL
Drawer 351
Middlebury, Vermont 05753
(802) 388-6356
Counsel for Respondents

JEFFREY L. AMESTOY,
Attorney General
MERIDETH WRIGHT,
Assistant Attorney General
Pavilion Building
Montpelier, Vermont 05602
(802) 828-3171
Attorneys for State of Vermont as Class Member

**Counsel of Record*

PETITION FOR CERTIORARI FILED JANUARY 22, 1986
CERTIORARI GRANTED MARCH 24, 1986

TABLE OF CONTENTS

The following opinions, orders and judgments have been omitted in printing this Joint Appendix because they appear in the appendix to the Petition for a Writ of Certiorari filed with this Court on January 22, 1986.

Docket Entries

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF VERMONT

78 Civ. 163

HARMEL OUELLETTE and LILA OUELLETTE, CLIFTON BROWNE and EDLA BROWNE, ALDEE PLOUFFE and SHIRLEY PLOUFFE, Individually, on behalf of themselves, and on behalf of all similarly situated plaintiffs

and

H. VAUGHN GRIFFIN, SR., ARDATH GRIFFIN, ALAN THORNDIKE, ELLEN THORNDIKE, WESLEY C. LARRABEE, VIRGINIA LARRABEE, F. ALFRED PATTERSON, JR., and LOIS T. PATTERSON,

Plaintiff-Intervenors,

v.

INTERNATIONAL PAPER COMPANY.

Date	*NR*	*Proceedings*
1978		
July 26	1	Filed Verified Petition for Removal.
July 26	2	Filed Bond for Removal.
July 26	3	Filed Notice of Petition for Removal.
July 26	4	Filed Deft's Answer. rer
July 28	5	Filed Docket entries, Complaint, Summons and return of service received from Addison County Superior Court. rer

Date	*NR*	*Proceedings*
Aug. 4	6	Filed Plaintiffs' Objection to Removal. cp
Aug. 21	7	Filed Plaintiffs' Memorandum in Support of Objection to Removal. rpd
Aug. 30	8	Filed Defendant's Memorandum in Opposition to Plaintiffs' Motion to Remand. cp
Sep. 1	9	Filed Deft's Certificate of Service re P#8. rer
Sep. 6	10	Filed Pltfs' Reply Memorandum to Deft's Memorandum in Opposition to Pltfs' Motion to Remand. rer
Sep. 7	11	Filed corrected copy of Page 2 of Plaintiffs' Reply Memo (P#10). cp
Nov. 3		In Chambers, Court advises counsel of his personal concern of the lake conditions (he feels he may be objective in this matter). Peter Langrock, Esq. and Susan Humphreys, Esq. for plaintiffs; John Dinse, Esq., Spencer Knapp, Esq., James W.B. Benkard, (Ms) Jamie Stern, Esq. and Robert M. Hunziker, Esq. for defendants.
Nov. 3		All counsel state that they have no qualms about the court deciding this matter—Court to go forward in this case.

Date	*NR*	*Proceedings*
Nov. 3		In open Court, hearing on plaintiffs' "objection to removal" considered by the court as a motion to remand.
Nov. 3		ORDERED: Motion denied. Plaintiff has 90 days from today to file motion for class action determination. gc
Nov. 4	12	Filed motion of Pltfs and H. Vaughn Griffin, Sr., Ardath Griffin, Alan Thorndike & Ellen Thorndike, proposed intervenors, to intervene.
Nov. 4	13	Filed memorandum in Support of motion to intervene.
Nov. 6		At the Call of the Calendar before Judge Coffrin, it was
Nov. 6		Ordered: Case continued for term; no further continuances granted.
Nov. 21	14	Filed Order—Motion of H. Vaughn Griffin, Sr., Ardath Griffin, Alan Thorndike & Ellen Thorndike to Intervene as party pltfs. granted. Mailed copy to Attys. rer
Nov. 24	15	Filed Deft's Consent to granting of Pltfs' Motion for Intervention, P# 12. rer
Nov. 29	16	Filed Plaintiffs' Motion to Allow Wesley C. Larrabee, Virginia Larrabee, F. Alfred Patterson, Jr., and Lois T. Patterson to Intervene as Plaintiffs. cp

Date	*NR*	*Proceedings*
Dec. 22	17	Filed Pltfs' Interrogatories to Deft. International Paper—First Set.
Dec. 22	18	Filed Order motion to intervene as party pltfs of Wesley C. & Virginia Larabee, F. Alfred & Lois T. Patterson is granted. Copy to Attys.
1979		
Jan. 16	19	Filed Pltfs' Motion for Class Determination.
Jan. 16	20	Filed Pltfs' Memo in support of P#19.
Jan 16	21	Filed Pltfs' Certificate of Service re P#19 & 20. rer
Jan. 29	22	Filed Deft's Motion for extension of time for filing Memo in Opposition to Pltfs' Motion for Class Action, by 50 days.
Jan. 29	23	Filed Deft's Memo in support of P#22. rer
Jan. 31	24	Filed Stipulation—that the time for defendant International Paper Company to answer or object to Plaintiffs' Interrogatories to Defendant International Paper Co.—First Set is extended from January 23, 1979 to February 22, 1979. cp
Feb. 11		Upon consideration of Stipulation, P#24, it is So Ordered that the time be extended from January 23, 1979 to February 22, 1979. Mailed copy to Attys. rar

Date	*NR*	*Proceedings*
Mar. 2	25	Filed Plaintiffs' Motion to Compel Defendant to Respond to Interrogatories—First Set dated (12/21/78): Memo in Support of Motion.
Mar. 6	26	Filed Order—Deft's Motion for Extension of Time for filing Memo in Opposition to Pltfs' Motion for Class Action granted; Deft. to file Memo on or before 4-24-79. Mailed copy to attys. rer
Mar. 13	27	Filed Deft's Memorandum of Law in Opposition to Pltfs' Motion to Compel Answers to Pltfs' Interrogatories—with Exhibit 1 attached.
Mar. 13	28	Filed Affidavit of James B. Benkard, dated March 12—with Exhibits "A" and "B" attached. gjl
Mar. 28	29	Filed Affidavit of Jean Anderson, Town Clerk of Shoreham, dated March 26—With attached lists of all landowners with property bordering Lake Champlain in the Town of Shoreham.
Mar. 28	30	Filed Affidavit of Richard L. Roscorla, Town Clerk of Bridport, dated March 22—With attached lists of all lake shore land owners of the Town of Bridport.
Mar. 28	31	Filed Affidavit of Jane B. Grace, Town Clerk of Addison, dated March 22—With attached lists of all lake shore land owners of the Town of Addison.

Date	*NR*	*Proceedings*
Mar. 28	32	Filed Certificate of Service for pgs. #29, 30 & 31. gjl
April 19		In open Court before Judge Coffrin, hearing on plaintiffs' motion to compel. Peter Langrock, Esq. for plaintiffs; James W.B. Benkard, Esq. for defendant.
April 19		Ordered: Motion denied.—Court directs counsel to get together and narrow the discovery area. gc
April 27	33	Filed Deft's Memo in Opposition to maintenance of case as class action.
April 27	34	Filed Affidavit of Robert J. Bachorik with Exhibits A & B attached, submitted by deft. rer
May 1		At the Call of the Calendar before Judge Coffrin, it was
May 1		Ordered: Case continued. cb
May 9	35	Filed Pltfs' Motion for Extension of Time (14 days) in which to respond by filing Memo in Opposition to Deft's Memo of Law in Opposition to Maintenance of case as class action, P#33. re
May 10		Based upon the foregoing Motion, it is ORDERED: granted. Copies mailed to attys. gl
May 11	36	Filed Deft International Paper's Consent to Pltfs' Motion for Extension of Time etc., P#35. rer

Date	*NR*	*Proceedings*
May 22	37	Filed Pltfs' Reply Memo on Class Certification Issue. rer
May 24	38	Filed Deposition of Lois Patterson.
May 24	39	Filed Deposition of F. Alfred Patterson, Jr.
May 24	40	Filed Deposition of Clifton Browne.
May 24	41	Filed Deposition of Edla Browne.
May 24	42	Filed Deposition of Harmel Ouellette.
May 24	43	Filed Deposition of Lila Ouellette.
May 24	44	Filed Deposition of Wesley Larrabee.
May 24	45	Filed Deposition of Virginia Larrabee.
May 24	46	Filed Deposition of Ellen Thorndike.
May 24	47	Filed Deposition of Alde Plooffe.
May 24	48	Filed Deposition of Shirley Plooffe.
May 24	49	Filed Deposition of Ardath Garrett Griffin.
May 24	50	Filed Deposition of H. Vaughn Griffin, Sr. gl
June 8	51	Filed Plaintiffs' Motion to Amend Complaint with Memorandum in Support. cp
June 19	52	Filed Defendant's Memorandum of Law in Opposition to Plaintiffs' Motion to Amend. gl

Date	*NR*	*Proceedings*
Oct. 9		At the Call of the Calendar before Judge Coffrin, it was
Oct. 9		Ordered: Case passed until motions heard.
1980		
Jan. 11	53	Filed Deft's Answers & Objections to Pltfs' 1st Set of Interrogatories, P#17. rer
Mar. 5		Calendar call before Judge Coffrin, it was
Mar. 5		Ordered: Case passed.
Apr. 7		In Court before Judge Coffrin, hearing on plaintiffs' motion to amend Complaint. Peter Langrock, Esq. and Susan Humphreys, Esq. for plaintiffs; Spencer Knapp, Esq., James W.B. Benkard, Esq., Robert M. Hunziker, Esq. and Kevin Simmons, Esq. for defendant.
Apr. 7		Ordered: Motion granted.
Apr. 7		Hearing on motion for class certification.
Apr. 7		Statements made by Mr. Langrock and by Mr. Benkard.
Apr. 7		Taken under advisement. gc
Apr. 7	54	Filed defendant's supplementary memorandum of law in opposition to maintenance of this case as a class action. gc

Date	*NR*	*Proceedings*
Apr. 24	55	Filed Opinion and Order—Certification of Air Class—DENIED. Certification of Water Class AFFIRMED for lakeshore owners in Towns of Bridport and Shoreham. Counsel to prepare Notice to class members and submit to court 21 days from the date of this Order. Copy to attorneys. cp
May 5	56	Filed Pltfs' Motion for Reconsideration.
May 5	57	Filed Pltfs' Memo in support of P# 56 w/map attached.
May 5	58	Filed Pltfs' Affidavit of Susan F. Humphrey, Esq., in re P#56. rer
May 14	59	Filed Deft's Motion for Amendment of Opinion & Order.
May 14	60	Filed Deft's Memo in support of P #59 & Memo in Opposition to P #56, Pltfs' Motion for Reconsideration. rer
May 16	61	Filed Affidavits of Susan F. Humphrey. rpd
June 23	62	Filed Stip.—Deft. Consents to enlargement of class to inc. property owners in Addison (south of Crown Pt. Bridge) re P#56 & in re P#55, Opinion & Order, & P#59, Deft's Motion to Amend same, Pltfs' have no objections to modification but

Date	*NR*	*Proceedings*
		reserve right to challenge defenses raised by deft. as not individual with ORDER granting same thereon. Mailed cpy/attys. rer
July 16	63	ORDERED: Notice to Class Members should follow the format in this order. 2. Pltfs' to prepare necessary number of notices. 3. Pltfs' shall address envelopes affix postage and submit them to Clerk for stuffing and mailing. 4. Pltfs' shall also cause to be prepared a return post-card as described in the order. 5. The notices, envelopes and cards shall be supplied to the Clerk's Office for processing or before 8-29-80. 6. Pltfs' shall also furnish to the Clerk, with copy to counsel a typewritten list of the names and addresses of all persons to whom the envelopes are addressed. Copy to Attys. gww
Aug. 13	64	Filed copy of approved Notice to Class Members. Mailed original to Attorney Eaton for further action. cb
Aug. 18		In Chambers before Judge Coffrin, informal conference re differences of counsel with respect to the language in the notices. Peter Langrock, Esq. for plaintiffs; Spencer Knapp, Esq. for defendant.

Date	*NR*	*Proceedings*
Aug. 25	65	Filed Plaintiff's letter with an attached alphabetical list by towns of lakeshore owners whom they addressed envelopes to receive the Notice pursuant to ORDER dated Jul 16, 1980, P#63. cp
Aug. 27	66	Filed Clerk's Cert. of Serv. re Notices mailed to class members concerning Order, P#63; list attach. Mailed cpy/Cert. to attys.
Oct. 1	67	Filed List of Member Pltfs requesting exclusion in this action. cp
Oct. 1	68	NOTICE OF APPEARANCE of Frederick deG. Harlow, Esq. for Paschal F. and Esther D. Mondella, Class members. gww
Oct. 3	69	INTERROGATORIES by Deft to all Listed Pltfs & Class Members.
Oct. 3	70	CERTIFICATE of Service by Deft for P#69. gww
Oct. 3	71	REQUEST for Exclusion from Class of Guy E. Smith. gww
Oct. 7		At the Call of the Calendar before Judge Coffrin, it was Ordered: Case continued.
Oct. 14	72	Filed Plaintiffs' Motion For A Protective Order.
Oct. 14	73	Filed Plaintiffs' Memorandum of Law in Support of P#72. cp

Date	*NR*	*Proceedings*
Oct. 16	74	Filed Plaintiffs' Motion to Contact Lessees.
Oct. 16	75	Filed Plaintiffs' Memorandum in Support of P#74. cp
Oct. 27	76	Filed Stip.—Parties consent to extension of time (to 10-31-80) in which deft. may file Memo in response to P#72, Pltfs' Motion for Protective Order. rr
Oct. 28		ORDER—Stipulation, P#76, is so Ordered. Copy to Attorneys. rpd
Oct. 31	77	Filed Defendant's Memorandum of Law in Opposition to Plaintiffs' Motion for a Protective Order, P#72.
Oct. 31	78	Filed Defendant's Certificate of Service. cp
Nov. 5	79	Request for Exclusion from class action of Nicholas Biscoe. rr
Nov. 26		Mailed Ltr to Messers Burrell and Dolphin, possible class members advising them of their right as lessees to Revoke their previous requests for exclusion. (P#67) Reply card to be returned to Clerk of Court within 10 days.
Dec. 15		In Court before Judge Coffrin, hearing on plaintiffs' motion for protective order. Susan Eaton, Esq. for plaintiffs; Spencer Knapp, Esq., James Benkard, Esq. and Kevin Simmons, Esq. for defendant.

Date	*NR*	*Proceedings*
Dec. 15		Matter held under advisement. Court suggests that counsel work out a modified method of discovery or interrogatories. (Counsel to advise the court as to the status of the matter) gc
Dec. 16	80	Filed Pltfs' Response to Question 6 of Deft's First set of Interrogatories. rpd
Dec. 22	81	Filed Letter dated 12-17-80 from Pltfs' attorney relative to inclusion of Mrs. Ethel Kelley as a class member of this law suit. rer
1981		
Feb. 6	82	Filed Letter to counsel from Clerk re inclusion of Mrs. Ethel Kelley as a class member (refer to pp. 81 and 67). cb
June 22	83	Filed defendant's Notice of motion to dismiss.
June 22	84	Filed Memorandum of law in support of defendant's motion to dismiss plaintiffs' first cause of action. gc
June 22		Status Conference held. Peter Langrock, Esq. and Susan Eaton, Esq. for plaintiffs; Spencer Knapp, Esq., James Benkard, Esq. and Ms. Jamie Stern, Esq. for defendant.
June 22		Statements made by counsel.

Date	*NR*	*Proceedings*
June 22		Ordered: plaintiffs have 30 days to respond to defendant's motion to dismiss (paper # 83); defendant has an additional 10 days thereafter to file reply memorandum.
June 22		Court will subsequently set a date for hearing on defendant's motion to dismiss and further preliminary conference as to how the case should be tried. gc
July 23	85	Filed plaintiffs' memorandum of law in opposition to defendant's motion to dismiss. gc
Aug. 5	86	Filed defendant's reply memorandum of law in support of defendant's motion to dismiss plaintiffs' first cause of action. gc
Sep. 25	87	LETTER from Atty Eaton stating that Philip Small of Shoreham should be removed from list of class members.
1982		
Feb. 1	88	LETTER dated 1-28-82 from Lawrence and Wanda Krause stating new address is 3471 Bender Avenue, Akron, Ohio 44319. rer Copy to attys. gww
Mar. 16	89	LETTER change of ownership of classmember from Howard, Leonard A., Jr., and Virginia to Holzinger, Ulrich G. and Jean M. gww

Date	*NR*	*Proceedings*
May 7	90	MOTION to Reconsider Denial of AIR CLASS by Pltfs.
May 7	91	MEMORANDUM in support of P# 90. gww
May 20	92	STIPULATION that deft be granted an extension of time, until 7-1-82, in which to file a memorandum of law in opposition to pltfs' Motion to Reconsider Denial of Class Certification of the Air Class, P#56. rer
May 26		ORDER—STIPULATION—So ORDERED. Cy to attys. (re: P#92) cp
July 1	93	MEMORANDUM in Opposition to Pltfs' Motion to Reconsider Denial of Class Certification of the Air Class, P# 91, with attachments. rer
July 1	94	CERTIFICATE OF SERVICE re P#93. rer
Sep. 24		In court before Judge Coffrin, hearing on plaintiffs' motion to reconsider denial of class certification of the Air Class. Peter Langrock, Esq. and Susan Eaton, Esq. for plaintiffs; James W. B. Benkard, Esq. and John Dinse, Esq. for defendant.
Sep. 24		Statements made to court by counsel.

Date	*NR*	*Proceedings*
Sep. 24		Taken under advisement. gc
Oct. 29	95	OPINION AND ORDER — AWC — Pltfs directed to identify potential class members (members of the certified water class who have not opted out) with 21 days of this order. Pltfs and Deft are directed to jointly prepare a draft of proposed notice to class members and submit it to court for consideration. Cy to parties. rer
Nov. 26	96	ORDER (copy)—AWC—approving NOTICE TO CLASS MEMBERS. Mailed original to Attorney Eaton for further action. cb
Dec. 13	97	ORDER (ORIGINAL)—AWC—aproving NOTICE TO CLASS MEMBERS, & sample of Notice as mailed.
Dec. 13		MAILED NOTICE TO CLASS MEMBERS pursuant to order P#97. gww
Dec. 17	98	ADDRESS LIST (updated) for class members. Notices remailed 12-17-82 by GWW. rer
Dec. 22	99	ADDRESS LIST (updated) for class members. Notices remailed 12-17-82 by GWW. gww
1983		
Jan. 20	100	REQUESTS for exclusion from air class (attachments) as certified by Clerk. rer Mailed cy to attys.

Date	*NR*	*Proceedings*
Feb. 7	101	NOTICE OF APPEARANCE of John H. Chase, Assistant Atty General, for State of VT Depts. of Fish & Game and Forests, Parks and Recreation. jj
Feb. 28	102	REQUESTS for exclusion re Lawrence and Wanda Krause and Walter and Helen Welch with letter dated 2-21-83 from Atty Eaton addressing the question of late exclusions and situation as to Patricia Noll. rer
Mar. 8	103	MOTION & MEMO to allow appearance and to Strike Request for Exclusion by VT Atty General.
Mar. 8	104	AFFIDAVIT of John H. Chase. lgl
Mar. 24	105	ORDER—AWC—Upon consideration of P#103, it is hereby ORDERED: That said motion be granted. The appearance of the Atty General of the State of VT for the State of VT, Dept. of Forests and Parks, shall be allowed and the request for exclusion previously filed on behalf of the Dept of Forests and Parks shall be stricken. Cy to attys. jj
1984		
April 4	106	LETTER dated 4/2/84 in support of Deft International Paper Company's motion to dismiss pltfs' First Cause of Action. amn
April 9	107	LETTER dated 4/9/84 in RESPONSE by Pltfs. (re: P#106) cp

Date	*NR*	*Proceedings*
April 12	108	ORDER—AWC—Defts to have until 5-1-84 in which to file additional brief and Pltfs to have until 5-23-84 in which to file responsive briefs. Cy to parties. rer
May 1	109	MEMORANDUM, Supplemental, in support of Defts Motion to Dismiss Pltfs' First Cause of Action, P# 83. rer
May 21	110	MEMORANDUM, Supplemental, in Opposition to Motion to Dismiss by Pltfs re P#83. rer
June 1	111	LETTER dated 5/29/84 from Atty. James Benkard as a Reply Memorandum to Pltfs' Supplemental Memorandum. (Re: P#83 and 110) cab
Aug. 16	112	LETTER dated 8-14-84 from Atty. James Benkard—with attachments —in support of Motion to Dismiss, P# 83. rer
Nov. 26		In court before Judge Coffrin, hearing on defendant's motion to dismiss plaintiff's first cause of action. Peter Langrock, Esq., Susan Eaton, Esq. for plaintiff; John Chase, Esq. for the state; James Benkard, Esq., Jamie Stern, Esq. and Austin Hart, Esq. for defendant.
Nov. 26		Statements made by counsel.
Nov. 26		Taken under advisement. gc

Date	*NR*	*Proceedings*
1985		
Feb. 5	113	ORDER—AWC—Deft's motion to dismiss is denied. Cys to attys. cab
Feb. 19	114	MOTION for Certification pursuant to 28 U.S.C. § 1292(b) to amend Court's Order to permit an interlocutory appeal and For Stay with MEMORANDUM by Deft. (P#113) wf
Feb. 20	115	MEMORANDUM in SUPPORT by Deft. (P#114) wf
Mar. 5	116	MEMORANDUM in Opposition to Motion for Certification and Stay by Pltf. (P#114) wf
Mar. 14	117	MEMORANDUM (Reply) in support of Motion for Certification and Stay Deft (P#114). amn
April 3	118	APPEARANCE of Merideth Wright, Ass't Attorney General for State of Vermont, substituting for John H. Chase, Esq. rer STARTED FOLDER NO. 5
April 23	119	Plaintiff class member State of Vermont's position in opposition to defendant's motion for certification and stay. gc
May 6		In court before Judge Coffrin, hearing on defendant's motion for certificate pursuant to 28 U.S.C., Sec. 1292(b).

Date	*NR*	*Proceedings*
May 6		Statements made by Mr. Benkard.
May 6		Ordered: Motion granted; defendant to prepare a proposed order for Court's signature (to be reviewed by Plaintiffs' counsel).
May 6		Court suggests that defendant pursue the class certification of the air class. gc
May 20	120	ORDER—AWC—Granting Motion for Certification to permit an interlocutory appeal. Cy to attys. cp
June 3	121	NOTICE OF MOTION to Dismiss
June 3	122	MEMORANDUM in Support of Deft's. motion to Dismiss Pltf's. Second Cause of Action (P#121)
June 3	123	AFFIDAVIT of Allen Cawrse (P# 121) lf
June 11	124	MOTION for Extension of Time within which to Respond to P# 122 by pltfs. jj
June 11		ORDERED — AWC — Motion Granted. Pltfs to respond by 7/23/85. Cy to attys. jj
June 12	125	SUPPORTING MEMORANDUM of Pltfs (P# 124). rer
June 24	126	ORDER—2d. Cir. entered 6-18-85—Permission to Appeal pursuant to 28 USC § 1292(b) is granted. cb
June 24		Received $65 docketing fee for appeal from Dinse, Erdmann & Clapp.

Docket Entries

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

85 Civ. 7506

HARMEL OUELLETTE and LILA OUELLETTE, CLIFTON BROWNE, EDLA BROWNE, ALDEE PLOUFFE and SHIRLEY PLOUFFE, individually, on behalf of themselves, and on behalf cf all similarly situated plaintiffs, H. VAUGHN GRIFFIN, SR., ARDATH GRIFFIN, ALAN THORNDIKE and ELLEN THORNDIKE, WESLEY C. LARRABEE and VIRGINIA LARRABEE, F. ALFRED PATTERSON, JR. and LOIS T. PATTERSON,

Plaintiffs-Appellees,

—v—

INTERNATIONAL PAPER COMPANY,

Defendant-Appellant.

Date	*Filings—Proceedings*
05-28-85	Movant INTERNATIONAL PAPER COMPANY Notice of Motion for Lease to Appeal pursuant to 28 U.S.C. § 1292(b), filed.
05-28-85	Movant INTL. PAPER CO. memo of law in support of motion received.
05-28-85	Movant INTL. PAPER CO. Notice of Motion for permission to exceed page limitation in second circuit rule 27(a)(2)(b), filed.
05-29-85	Order granting the movants motion for permission to exceed pg. limit etc., filed. (By: ALK).

Date	*Filings—Proceedings*
05-29-85	Movant INTL. PAPER Co. memo of law in support of 1292b motion, filed.
05-31-85	Respondents HARMEL OUELLETTE *et al.* Answer to Movant's Petition for Permission to Appeal pursuant to 28 U.S.C. § 1292(b) filed (w/pfs) (all ccs to Calendar Unit).
06-05-85	Movant INTL. PAPER Co. Reply Memorandum in support of its motion for leave to appeal, filed. (orig & 3cc Calendaring).
06-18-85	Order granting the appellant INTERNATIONAL PAPER COMPANY Motion for leave to appeal. filed. (By: EAVG, GCP, & EDR, US Cit).
06-21-85	Certified copy of the order filed on 6-18-85 issued to the district court, Vermont.
06-26-85	Copy of receipt re: Payment of docketing fee in district court filed.
06-26-85	Appellant INTERNATIONAL PAPER COMPANY Form C (filed w/pfs).
06-26-85	Appellant INTERNATIONAL PAPER COMPANY Form D filed.
06-28-85	Scheduling Order No. 1, filed.
07-01-85	Copy of district court docket entries, filed.
07-17-85	Record on appeal original district court papers filed.
07-22-85	Appellant INTERNATIONAL PAPER COMPANY briefs filed w/pfs.
07-22-85	Appellant INTERNATIONAL PAPER COMPANY joint appendices filed w/pfs.
08-12-85	Appellee's HARMEL OUELLETTE and LILA OUELLETTE briefs filed (w/p/s).

Date	*Filings—Proceedings*
08-19-85	Movant Atty. General of the State of New York, *amicus curiae* motion for leave to file brief out of time and to participate in oral argument filed. (see order filed 8-23-85)
08-21-85	Appellant INTERNATIONAL PAPER motion for extension of time to file reply brief pursuant to FRAP w/pfs filed. See order filed 8/23/85. 14 days after 9/3.
08-21-85	Appellant INTERNATIONAL PAPER Co. memorandum in response to motion to file a amicus brief w/pfs filed. (see order filed 8-15-85)
08-23-85	Order granting appellant INTERNATIONAL PAPER Co. motion for cross-motion for extension of time to file reply brief pursuant to F.R.A.P. 26 b) filed.
08-23-85	Order granting *amicus curiae* Atty Gen. of the State of New York motion for leave to file *amicus curiae* out of time and INT'L PAPER is given 14 days thereafter to file its reply brief, filed.
08-04-85	Appellant INTERNATIONAL PAPER Co. reply brief filed (w/pfs).
09-01-85	Letter of State of Vermont adopting the points and arguments of appellee Ouellette brief filed.
10-17-85	Case heard before Kaufman, Pratt, Miner, C.JJ.
11-04-85	Judgment affirmed by published signed opinion per curiam.
11-04-85	Judgment filed.

Date	*Filings—Proceedings*
11-19-85	Appellee's HARMEL OUELLETTE and LILA OUELLETTE itemized and verified bill received (w/pfs) [federal expressed, per D.G.].
12-05-85	Mandate (judgment, opinion) issued to VT.
12-10-85	Appellees HARMEL OUELLETTE and LILA OUELLETTE statement of costs filed.
12-10-85	Certified copy of statement of costs issued with letter.
01-30-86	Notice of filing of petition for writ of certiorari, petitioner INTERNATIONAL PAPER COMPANY, Supreme Court docket No. 85-1233, filed.
03-27-86	Certified copy of order of Supreme Court granting petition for writ of certiorari, filed.
04-14-86	Certified original record and proceedings (District Court and US Court of Appeals sent to Supreme Court).

Summons

ADDISON SUPERIOR COURT

STATE OF VERMONT

ADDISON COUNTY, SS

Civil Action, Docket No. ———

HARMEL OUELLETTE and LILA OUELLETTE, CLIFTON BROWNE and EDLA BROWNE, ALDEE PLOUFFE and SHIRLEY PLOUFFE, individually, on behalf of themselves, and on behalf of all similarly situated Plaintiffs,

v.

INTERNATIONAL PAPER COMPANY

To the above named defendant(s):

You are hereby summoned and required to serve upon Peter F. Langrock, Esquire, plaintiff's attorney, whose address is Langrock Sperry Parker and Stahl, P.O. Drawer 351, Middlebury, Vermont 05753, in answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. Your answer must be filed with the court. Unless the relief demanded in the complaint is for damage covered by a liability insurance policy under which the insurer has the right or obligation to conduct the defense, or unless otherwise provided in Rule 13(a), your answer must state as a

counterclaim any related claim which you may have against the plaintiff, or you will thereafter be barred from making

Dated: 3d June 1976

/s/ PETER F. LANGROCK, ESQUIRE

.....

Plaintiff's Attorney

Peter F. Langrock, Esquire

Served on 7-5-78

.....

(Date)

/s/ Signature Illegible

.....

Deputy Sheriff

Complaint

ADDISON SUPERIOR COURT

STATE OF VERMONT

ADDISON COUNTY

Docket No. ——

HARMEL OUELLETTE and LILA OUELLETTE, CLIFTON BROWNE and EDLA BROWNE, ALDEE PLOUFFE and SHIRLEY PLOUFFE, individually, on behalf of themselves, and on behalf of all similarly situated Plaintiffs,

v.

INTERNATIONAL PAPER COMPANY

COMPLAINT

NOW COME the Plaintiffs, HARMEL OUELLETTE and LILA OUELLETTE, CLIFTON BROWNE and EDLA BROWNE, ALDEE PLOUFFE and SHIRLEY PLOUFFE, individually, on behalf of themselves, and on behalf of all similarly situated Plaintiffs, by and through their attorney, Peter F. Langrock, Esquire, of the law firm of Langrock Sperry Parker and Stahl, and complain as follows:

FIRST CAUSE OF ACTION

COUNT I

1. Plaintiffs Harmel Ouellette, Lila Ouellette, Clifton Browne, Edla Browne, Aldee Plouffe, Shirley Plouffe, are citizens of the Town of Bridport, County of Addison, State of Vermont.

2. Defendant is a corporation organized under the laws of the State of New York with its principal place of business

in the state of New York, and registered to do business in Vermont.

3. Plaintiffs bring this Count of this action on behalf of themselves and, under Rule 23 of the Vermont Rules of Civil Procedure, on behalf of all other Lake Champlain lakeshore landowners and lakeshore lessees similarly situated and located in the Towns of Shoreham, Bridport and Addison, County of Addison, State of Vermont; the said lakeshore landowners and lakeshore lessees in the Towns of Shoreham, Bridport and Addison number approximately 250 and it is therefore impracticable to bring them all before this Court.

4. There are questions of law and fact common to the entire class of lakeshore landowners and lakeshore lessees similarly situated and located in the Towns of Addison, Bridport and Shoreham; the claims of the plaintiffs herein are typical of the claims of the said class; and the plaintiffs will fairly and adequately protect the interests of and represent said class; the common questions of law and fact predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of this controversy.

5. The Defendant, International Paper Company, operates and has operated a pulp and paper making plant approximately four miles north of the Village of Ticonderoga, New York.

6. At all times material hereto the Defendant, International Paper Company, has discharged pulp and paper making waste from said plant into Lake Champlain.

7. Said wastes exceed the capacity of Lake Champlain to assimilate them and are detrimental to the Lake, and its fish and plant life.

8. Said discharges are foul, unhealthy, smelly, and aesthetically unpleasing and discolor the waters in, around and adjacent to Plaintiffs' lakeshore properties, and the lakeshore properties of other members of the class, make said waters turbid, and make them unfit for recreational use.

9. Said discharges constitute a continuing nuisance to the Plaintiffs and other members of the class, and interfere with their use and enjoyment of their property and have diminished and will continue to diminish the fair market value and rental value of their property.

WHEREFORE, Plaintiffs, on behalf of themselves and other members of the Class, pray for judgment in the amount of TWENTY MILLION DOLLARS ($20,000,000.00), together with interest and costs and attorneys' fees, and for such other relief as this Court deems proper. Plaintiffs request trial by jury.

Plaintiffs further pray that the following equitable relief be granted: That this Court order Defendant to relocate all water intakes on Lake Champlain (by which it draws water from Lake Champlain for use in said plant) to be in direct proximity with the opening of all discharge outlets on Lake Champlain from which it discharges wastes from its manufacturing operations that have been treated through its waste treatment system.

COUNT II

1. Plaintiffs reallege and incorporate herein as though specifically set forth Paragraphs 1 through 6 of Count I of the First Cause of Action.

2. On November 18, 1974, the Regional Administrator of the United States Environmental Protection Agency, Region II made a final determination pursuant to Section

402 of the Federal Water Pollution Control Act Amendments of 1972, 33 USC § 1342, to issue a National Pollutant Discharge Elimination System permit for the discharge of pollutants from the said plant into Lake Champlain (permit numbers NY 002 0036 and NY 000 4413), said permit to be effective on December 31, 1974. Said permit was later amended effective March 15, 1977.

3. Defendant, International Paper Company, has consistently, knowingly and deliberately violated the terms of this permit by discharging into Lake Champlain waste materials in excess of the amounts specified under the permit.

4. These discharges, in violation of the permit, exceed the capacity of Lake Champlain to assimilate them and are detrimental to the Lake and its fish and plant life. These discharges are foul, unhealthy, smelly, and aesthetically unpleasing and discolor the waters in, around and adjacent to Plaintiffs' lakeshore properties, and the lakeshore properties of other members of the class, make said waters turbid, and make them unfit for recreational use. Said discharges interfere with Plaintiffs' use and enjoyment of their property and have decreased the market value and rental value of their property.

WHEREFORE, Plaintiffs, on behalf of themselves and other members of the Class, pray for judgment in the amount of TWENTY MILLION DOLLARS ($20,000,000.00), together with interest and costs and attorneys' fees, and for such other relief as this Court deems proper. Plaintiffs request trial by jury.

Plaintiffs further pray that the following equitable relief be granted: That this Court order Defendant to relocate all water intakes on Lake Champlain (by which it draws water from Lake Champlain for use in said plant) to be

in direct proximity with the opening of all discharge outlets on Lake Champlain from which it discharges wastes from its manufacturing operations that have been treated through its waste treatment system.

COUNT III

1. Plaintiffs reallege and incorporate herein as though specifically set forth Paragraphs 1 through 8 of Count I of the First Cause of Action.

2. The uses of the waters of Lake Champlain by the defendant as aforesaid are unreasonable and in violation of the rights of the Plaintiffs and other members of the class to the use of said waters as riparian owners.

3. The Defendant, as a proximate result of the aforesaid use, has damaged and permanently reduced the value of the riparian rights of the Plaintiffs and other members of the Class in that the Defendant has impaired the recreational value of the waters of Lake Champlain in, around, and adjacent to the lakeshore properties of the Plaintiffs and other members of the class, in that the Defendant has so polluted said waters that they are unfit for any reasonable use.

WHEREFORE, the Plaintiffs, on behalf of themselves and other members of the Class, pray for judgment against the Defendant in the amount of TWENTY MILLION DOLLARS ($20,000,000.00) together with interest and costs and attorneys' fees, and for such other relief as this Court deems proper. Plaintiffs request trial by jury.

Plaintiffs further pray that the following equitable relief be granted: That this Court order Defendant to relocate all water intakes on Lake Champlain (by which it draws water from Lake Champlain for use in said plant) to be in direct proximity with the opening of all discharge outlets

on Lake Champlain from which it discharges wastes from its manufacturing operations that have been treated through its waste treatment system.

COUNT IV

1. Plaintiffs reallege and incorporate herein as though specifically set forth Paragraphs 1 through 5 of Count I of the First Cause of Action.

2. At all times material hereto, the Defendant, International Paper Company, in violation of its duty to other lakeshore property owners has negligently discharged pulp and paper making waste into Lake Champlain.

3. Said wastes exceed the capacity of Lake Champlain to assimilate them and are detrimental to the Lake and its fish and plant life.

4. Said discharges are foul, unhealthy, smelly, and aesthetically unpleasing and discolor the waters in, around and adjacent to Plaintiffs' lakeshore properties, and the lakeshore properties of other members of the class, make said waters turbid, and make them unfit for recreational use.

5. Said discharges interfere with Plaintiffs' use and enjoyment of their property and have diminished and will continue to diminish the fair market value and rental value of their property.

WHEREFORE, Plaintiffs, on behalf of themselves and other members of the Class, pray for judgment in the amount of TWENTY MILLION DOLLARS ($20,000,000.00), together with interest and costs and attorneys' fees, and for such other relief as this Court deems proper. Plaintiffs request trial by jury.

Plaintiffs further pray that the following equitable relief be granted: That this Court order Defendant to relocate

all water intakes on Lake Champlain (by which it draws water from Lake Champlain for use in said plant) to be in direct proximity with the opening of all discharge outlets on Lake Champlain from which it discharges wastes from its manufacturing operations that have been treated through its waste treatment system.

COUNT V

1. Plaintiffs reallege and incorporate herein as though specifically set forth Paragraphs 1 through 9 of Count I, Paragraphs 2 through 4 of Count II, Paragraphs 2 through 3 of Count III and Paragraphs 2 through 5 of Count IV, of the First Cause of Action.

2. The Defendant had and has the means at its reasonable disposal of dealing with the waste and pollutants of its plant so as not to affect the interests of the Plaintiffs and other members of the class, but has failed and continues to fail to use such means.

3. Defendant deliberately located said plant on Lake Champlain, which plant became operational in 1971, knowing full well from its experience with its old plant, located in the Village of Ticonderoga, New York, that Lake Champlain is unable to assimilate said discharges.

4. The actions of the Defendant as set forth above were and are malicious, willful, and undertaken with reckless and wanton disregard of Plaintiffs' rights.

WHEREFORE, the Plaintiffs, on behalf of themselves and all members of the Class, pray that they be awarded punitive and exemplary damages in the amount of ONE HUNDRED MILLION DOLLARS ($100,000,000.00).

The Plaintiffs further pray that such sums as are awarded for such exemplary and punitive damages be set aside for the benefit of encouraging a pollution-free environment

in the area of Lake Champlain and its tributaries, under such terms and conditions as are set forth by this Court or, in the alternative, that such funds be distributed in equal amounts among the Class; and the Plaintiffs further pray that this matter be tried by jury.

Second Cause of Action

Count I

1. Plaintiffs Harmel Ouellette, Lila Ouellette, Clifton Browne, Edla Browne, Aldee Plouffe, Shirley Plouffe, are citizens of the Town of Bridport, County of Addison, State of Vermont.

2. Defendant is a corporation organized under the laws of the State of New York with its principal place of business in the state of New York, and registered to do business in Vermont.

3. Plaintiffs bring this Count of this action on behalf of themselves and, under Rule 23 of the Vermont Rules of Civil Procedure, on behalf of all other residents and property owners and lessees similarly situated and located in the Towns of Shoreham, Bridport, Addison, and Orwell, County of Addison, State of Vermont; the said residents, property owners, and lessees number approximately 3,150 and it is therefore impracticable to bring them all before the Court.

4. There are questions of law and fact common to the entire class of residents, property owners, and lessees located in the Towns of Addison, Bridport, Shoreham, Orwell; the claims of the Plaintiffs herein are typical of the claims of the said class; and the Plaintiffs will fairly and adequately protect the interest of and represent said class; the common questions of law and fact predominate over any questions affecting only individual members, and a class action is

superior to other available methods for the fair and efficient adjudication of this controversy.

5. At all times material hereto, the Defendant, International Paper Company, operates and has operated a pulp and paper making plant approximately four miles north of the Village of Ticonderoga, New York.

6. Said plant discharges, smoke, fumes and other discharges, which smoke, fumes and other discharges are foul, unhealthy, smelly, and aesthetically unpleasing. Said smoke and fumes travel across Lake Champlain to the Towns of Shoreham, Bridport, Addison and Orwell. The presence of said smoke and fumes and other discharges in Plaintiffs' town and in the towns of other members of the class, has impaired their health and that of their families and has diminished and will continue to diminish the fair market value and rental value of their property. Said smoke and fumes and other discharges constitute a nuisance, and interfere with Plaintiffs' and other class members' use and enjoyment of their property.

Wherefore, the Plaintiffs, on behalf of themselves and other members of the class, demand judgment against the Defendant in the amount of Sixty -Two Million Dollars ($62,000,000.00), together with interest and costs and attorneys' fees. Plaintiffs request trial by jury.

Count II

1. Plaintiffs reallege and incorporate herein as though specifically set forth Paragraphs 1 through 6 of Count I of the Second Cause of Action.

2. Defendant, International Paper Company, in violation of its duty to Plaintiffs and other members of the class, negligently discharges smoke and fumes and other discharges from said plant, which smoke and fumes and other

discharges are foul, unhealthy, smelly, and aesthetically unpleasing. Said smoke and fumes and other discharges travel across Lake Champlain to the Towns of Shoreham, Bridport, Addison and Orwell. The presence of said smoke and fumes in Plaintiffs' town and in the towns of other members of the class, has impaired their health and that of their families and has diminished and will continue to diminish the fair market value and rental value of their property. Said smoke and fumes and other discharges interfere with Plaintiffs' and other class members' use and enjoyment of their property.

WHEREFORE, the Plaintiffs, on behalf of themselves and other members of the class, demand judgment against the Defendant in the amount of SIXTY-TWO MILLION DOLLARS ($62,000,000.00), together with interest and costs and attorneys' fees. Plaintiffs request trial by jury.

COUNT III

1. Plaintiffs reallege and incorporate herein as though specifically set forth Paragraphs 1 through 6 of Count I and Paragraph 2 of Count II of the Second Cause of Action.

2. The Defendant had and has the means at its reasonable disposal of dealing with the smoke and fumes and other discharges of its plant so as to not affect the interests of the Plaintiffs and other members of the class, but it has failed and continues to fail to use such means.

3. The actions of the Defendant, as set forth above, are malicious, willful, and undertaken with reckless and wanton disregard of Plaintiffs' rights.

WHEREFORE, the Plaintiffs, on behalf of themselves and all members of the class, pray that they be awarded punitive and exemplary damages in the amount ONE HUNDRED MILLION DOLLARS ($100,000,000.00).

Plaintiffs further pray that such sums as are awarded for such exemplary and punitive damages be set aside for the benefit of encouraging a pollution free atmosphere in the Towns of Addison, Shoreham, Bridport, Orwell; or in the alternative that such funds be distributed in equal amounts among the members of the class.

Plaintiffs request trial by jury.

DATED at Middlebury, in the County of Addison and State of Vermont this 30th day of June, 1978.

LANGROCK SPERRY PARKER AND STAHL

By /s/ PETER F. LANGROCK, ESQUIRE

.....

Peter F. Langrock, Esquire
A Member of the Firm
P.O. Drawer 351
Middlebury, Vermont 05753

[Affidavit of Service omitted in printing]

Answer

UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT

HARMEL OUELLETTE and LILA OUELLETTE, CLIFTON BROWNE and EDLA BROWNE, ALDEE PLOUFFE and SHIRLEY PLOUFFE, Individually, on behalf of themselves, and on behalf of all similarly situated Plaintiffs,

Plaintiffs,

—against—

INTERNATIONAL PAPER COMPANY,

Defendant.

Defendant International Paper Company, by its attorneys Dinse, Allen & Erdmann, for its answer to the Complaint herein:

FIRST CAUSE OF ACTION

COUNT I

1. Lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 1.

2. Admits paragraph 2.

3. Denies paragraph 3, except admits that the plaintiffs purport to bring this Count on behalf of the class of persons alleged therein.

4. Denies paragraph 4.

5. Admits paragraph 5.

6. Denies paragraph 6.

7. Denies paragraph 7.

8. Denies paragraph 8.

9. Denies paragraph 9.

COUNT II

1. Answering paragraph 1, defendant repeats and incorporates herein, as though specifically set forth, the answers of paragraphs 1 through 6 to Count I of the First Cause of Action.

2. Admits paragraph 2.

3. Denies paragraph 3.

4. Denies paragraph 4.

COUNT III

1. Answering paragraph 1, defendant repeats and incorporates herein, as though specifically set forth, the answers of paragraphs 1 through 8 to Count I of the First Cause of Action.

2. Denies paragraph 2.

3. Denies paragraph 3.

COUNT IV

1. Answering paragraph 1. defendant repeats and incorporates herein, as though specifically set forth, the answers of paragraphs 1 through 8 to Count I of the First Cause of Action.

2. Denies paragraph 2.

3. Denies paragraph 3.

4. Denies paragraph 4.

5. Denies paragraph 5.

COUNT V

1. Answering paragraph 1, defendant repeats and incorporates herein, as though specifically set forth, the answers of paragraphs 1 through 9 to Count I, paragraphs 2 through 4 to Count II, paragraphs 2 and 3 to Count III, and paragraphs 2 through 5 to Count IV of the First Cause of Action.

2. Denies paragraph 2.

3. Denies paragraph 3.

4. Denies paragraph 4.

SECOND CAUSE OF ACTON

COUNT I

1. Lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 1.

2. Admits paragraph 2.

3. Denies paragraph 3, except admits that the plaintiffs purport to bring this Count on behalf of the class of persons alleged therein.

4. Denies paragraph 4.

5. Denies paragraph 5, except admits that defendant operates and has operated a pulp and paper making plant approximately four miles north of the Village of Ticonderoga, New York.

6. Denies paragraph 6.

COUNT II

1. Answering paragraph 1, defendant repeats and incorporates herein, as though specifically set forth, the answers of paragraphs 1 through 6 of Count I of the Second Cause of Action.

2. Denies paragraph 2.

COUNT III

1. Answering paragraph 1, defendant repeats and incorporates herein, as though specifically set forth, the answers of paragraphs 1 through 6 of Count I and paragraph 2 to Count II of the Second Cause of Action.

2. Denies paragraph 2.

3. Denies paragraph 3.

FIRST AFFIRMATIVE DEFENSE

1. The Complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

2. The claims set forth in the Complaint are barred in whole or in part by the statute of limitations.

THIRD AFFIRMATIVE DEFENSE

3. The claims set forth in the Complaint are barred in whole or in part by laches.

FOURTH AFFIRMATIVE DEFENSE

4. Plaintiffs lack standing to obtain the equitable relief prayed for.

FIFTH AFFIRMATIVE DEFENSE

5. Plaintiffs have failed to join persons needed for a just adjudication of the actions.

WHEREFORE, defendant International Paper Company demands judgment dismissing the Complaint herein, together with the costs and disbursements of this action, and such other relief as the Court may deem appropriate.

Dated: Burlington, Vermont
July 24, 1978

Dinse, Allen & Erdmann
186 College Street
Burlington, Vermont

By Illegible

. . . . . .

A Member of the Firm

Davis Polk & Wardwell
One Chase Manhattan Plaza
New York, New York

By Illegible

. . . . . .

A Member of the Firm

Attorneys for Defendant
International Paper Company

Robert McK. Hunziker, Esq.
International Paper Company

Of Counsel

Motion to Amend Complaint

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF VERMONT

CIVIL ACTION

File No. 78-163

HARMEL OUELLETTE, *et al.*

v.

INTERNATIONAL PAPER COMPANY

MOTION TO AMEND

NOW COME the Plaintiffs, by and through their attorney Susan F. Humphrey, of the law firm of Langrock Sperry Parker and Stahl, pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, and request permission of this Court to amend their Complaint to add the following requested relief to Counts I, II and III of the Second Cause of Action:

> Plaintiffs further pray that the following equitable relief be granted: That this Court order Defendant to reduce the emissions of smoke, fumes and other discharges to a level whereby they do not travel across Lake Champlain and interfere with Plaintiffs' use and enjoyment of their property.

DATED at Middlebury, in the County of Addison and State of Vermont this 6th day of June, 1979.

LANGROCK SPERRY PARKER and STAHL

By . . . . . .
Susan F. Humphrey, Esquire
A Member of the Firm
Attorneys for Plaintiffs

Order Granting Plaintiff's Motion to Amend Complaint—Docket Entry

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF VERMONT

78 Civ. 163

HARMEL OUELLETTE and LILA OUELLETTE, CLIFTON BROWNE and EDLA BROWNE, ALDEE PLOUFFE and SHIRLEY PLOUFFE, Individually, on behalf of themselves, and on behalf of all similarly situated plaintiffs

and

H. VAUGHN GRIFFIN, SR., ARDATH GRIFFIN, ALAN THORNDIKE, ELLEN THORNDIKE, WESLEY C. LARRABEE, VIRGINIA LARRABEE, F. ALFRED PATTERSON, JR., and LOIS T. PATTERSON,

Plaintiff-Intervenors,

v.

INTERNATIONAL PAPER COMPANY.

Date	*NR*	*Proceedings*
1980		
Apr. 7		In Court before Judge Coffrin, hearing on plaintiffs' motion to amend Complaint. Peter Langrock, Esq. and Susan Humphreys, Esq. for plaintiffs; Spencer Knapp, Esq. James W.B. Benkard, Esq., Robert M. Hunziker Esq. and Kevin Simmons Esq. for defendant.
Apr. 7		Ordered: Motion granted.

Opinion and Order

UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT

Civ. A. No. 78-163

HARMEL OUELLETTE and LILA OUELLETTE, CLIFTON BROWNE and EDLA BROWNE, ALDEE PLOUFFE and SHIRLEY PLOUFFE, Individually, on behalf of themselves, and on behalf of all similarly situated plaintiffs

and

H. VAUGHN GRIFFIN, SR., ARDATH GRIFFIN, ALAN THORNDIKE, ELLEN THORNDIKE, WESLEY C. LARRABEE, VIRGINIA LARRABEE, F. ALFRED PATTERSON, JR., and LOIS T. PATTERSON,

Plaintiff-Intervenors,

v.

INTERNATIONAL PAPER COMPANY.

Peter F. Langrock and Susan Humphrey, Langrock, Sperry, Parker & Stahl, Middlebury, Vt., for plaintiffs.

John M. Dinse and Spencer Knapp, Dinse, Allen & Erdmann, Burlington, Vt., James W.B. Benkard, Robert M. Hunziker and Kevin Simmons, Davis, Polk & Wardwell, New York City, for defendant.

OPINION AND ORDER

COFFRIN, District Judge.

In this diversity action for damages and injunctive relief, plaintiffs have moved for certification of two plaintiff classes

pursuant to Fed. R. Civ. P. 23. The Complaint is styled in two "causes of action" and different classes are proposed for each. Defendant opposes certification of both proposed classes.

Facts

This action began on July 5, 1978, in Vermont's Addison County Superior Court and defendant properly removed it to this court on July 25, 1978. Following removal several of the presently named plaintiffs were permitted to intervene. This case is the latest expression of some Vermonters' unhappiness with the condition of Lake Champlain's waters. It represents a continuation of both private, *e.g.*, *Zahn* v. *International Paper Co.*, 53 F.R.D. 430 (D. Vt. 1971), *aff'd*, 469 F.2d 1033 (2d Cir. 1972), *aff'd*, 414 U.S. 291, 94 S. Ct. 505, 38 L. Ed.2d 511 (1973), and public efforts to impose liability on International Paper Company (IPC) for its discharges into Lake Champlain. *Vermont* v. *New York*, 406 U.S. 186, 92 S. Ct. 1603, 31 L. Ed.2d 785 (1972) (motion for leave to file bill of complaint granted), *dismissed*, 419 U.S. 955, 95 S. Ct. 246, 42 L. Ed.2d 260 (1974); *see* Note, *The Battle of Lake Champlain—Interstate Pollution and the Inadequacy of the Judicial Process*: *Vermont* v. *New York*, 1 Vt. L. Rev. 175 (1976).

Plaintiffs are Vermont residents who own property on or near the "south lake" area of Lake Champlain in the vicinity of the Crown Point Bridge; defendant is a New York corporation with its principal place of business in New York. It operates a paper mill near Ticonderoga, New York, across the south lake from plaintiffs' property. Jurisdiction is grounded on 28 U.S.C. § 1332(a).

Plaintiffs request certification of two classes which we will refer to as the "water class" and the "air class." The water class would consist of approximately 400 lakeshore property owners and lessees in the towns of Shoreham, Bridport and

Addison. Plaintiffs claim on behalf of this class that IPC's discharge of papermaking waste into Lake Champlain constitutes a nuisance that diminishes the value and interferes with the enjoyment of their property.

The air class would consist of approximately 3150 property owners, lessees and residents in Shoreham, Bridport, Addison and Orwell. On behalf of this class plaintiffs claim that the airborne discharges from defendant's paper mill travel across Lake Champlain and create a nuisance in the designated towns. In addition to diminished property value, plaintiffs claim this class has suffered impaired health as a result of defendant's alleged air pollution.[1]

On behalf of both proposed classes plaintiffs seek monetary damages and equitable relief ordering IPC to relocate the source of its water intake system closer to the source of its waste discharge system.

Discussion

To maintain this as a class action, plaintiffs must satisfy the four prerequisites of Fed. R. Civ. P. 23(a) and the two elements of the rule 23(b)(3) form of action they propose. We consider these separately below.

1. Prerequisites

We have no difficulty finding that the proposed classes are sufficiently numerous that joinder is impracticable, Fed. R. Civ. P. 23(a)(1), and that there are questions of law or fact common to the classes. *Id.* (a)(2). Although numbers alone do not determine impracticability of joinder, *see, e.g.*, *EWH* v. *Monarch Wine Co.*, 73 F.R.D. 131, 133

[1] At the hearing on plaintiffs' motion for class certification the argument of plaintiffs' counsel regarding the allegation in the complaint of impaired health was somewhat equivocal. The court did not understand, however, that the claim was being withdrawn.

(E.D.N.Y. 1977), and geographical distribution of a proposed class is of considerable importance, *Glover* v. *McMurray*, 361 F. Supp. 235, 241 (S.D.N.Y.), *rev'd and remanded on other grounds*, 487 F.2d 403 (2d Cir. 1973), *vacated and remanded on other grounds*, 417 U.S. 963, 94 S. Ct. 3166, 41 L. Ed.2d 1136 (1974), we are nevertheless persuaded by the numbers involved in the proposed classes. Defendant does not dispute plaintiffs' approximations of size—determined on the basis of information obtained from the respective Towns' Clerks and population reports in the *Vermont Year Book*—and we have found such numbers to be convincing in the past. *D. C.* v. *Surles*, No. 78-91 (D. Vt. December 6, 1978).

Similarly we are satisfied that there are questions of law and fact common to the classes. Plaintiffs seek redress for injuries allegedly caused by continuing acts of defendant. Central to the claims of all members of the proposed classes are the fact questions of the quality, amount and distribution of defendant's discharges and the legal questions of defendant's liability therefor. In addition, defendant may have defenses that would be common to the claims of all the class members. These questions are "shared in the grievances of the prospective class[es] as defined," 3B *Moore's Federal Practice* ¶ 23.06-1, at 23-173 (2d ed. 1979), and we conclude that the requirement of rule 23(a)(2) is also met in this case. Although in its argument concerning rule 23(b)(3) defendant opposes certification on the basis of rules 23(a)(1) and (2) its primary contention is that rules 23(a)(3) and (4) are not satisfied.

Rule 23(a)(3) requires that the proposed representative's claims be typical of the claims of the proposed class.

At least one commentator doubts that rule 23(a)(3) imposes a requirement of independent significance, 3B *Moore's Federal Practice* ¶ 23.06-2, at 23-185 (2d ed. 1979), but we are more inclined to agree with Judge Muir that we should not lightly conclude that a meaningless provision was promulgated. *In re Anthracite Coal Anti-trust Litigation*, 78 F.R.D. 709, 716 (M.D. Pa. 1978); *see, e. g.*, *Taylor* v. *Safeway Stores, Inc.*, 524 F.2d 263, 269-70 (10th Cir. 1975) (rule 23(a)(3) requires comparison of plaintiff's claims with those of proposed class). We are satisfied, however, that a comparison of the named plaintiffs' claims with those of the proposed classes need not reveal identity to be "typical." "Factual variations are not fatal to a proposed class when the claims arise out of the same remedial and legal theory." *Wofford* v. *Safeway Stores, Inc.*, 78 F.R.D. 460, 488 (N.D. Cal. 1978). To be "typical," plaintiffs' claims must be "co-extensive with, and not inimical to, those of the proposed class," *Levine* v. *Berg*, 79 F.R.D. 95, 97 (S.D.N.Y. 1978), and they must not be subject to unique defenses that are inapplicable to other members of the proposed class. *Greenspan* v. *Brassler*, 78 F.R.D. 130, 132 (S.D.N.Y. 1978). The rough benchmark in this circuit apears to measure typicality by the likelihood that all members of the proposed class " 'will be helped' " if the would-be representatives establish their claim, *Gill* v. *Monroe County Department of Social Services*, 79 F.R.D. 316, 326 (W.D. N.Y. 1978) (quoting *Eisen* v. *Carlisle & Jacquelin*, 391 F.2d 555, 562 (2d Cir. 1968), *vacated on other grounds*, 417 U.S. 156, 94 S. Ct. 2140, 40 L. Ed.2d 732 (1974)), and the lack of adverse interests between the named plaintiffs and the proposed class members. *Women's Committee for Equal Employment Opportunity* v. *National Broadcasting Co.*, 71 F.R.D. 666, 670 (S.D.N.Y. 1976); *Cutner* v. *Fried*, 373 F. Supp. 4, 13 (S.D.N.Y. 1974).

Defendant, relying on its depositions of plaintiffs, argues that they do not all allege the same kinds of damage they claim on behalf of the classes they purport to represent.

According to defendant this proves as a matter of logic that plaintiffs' claims are not typical. But defendant appears to misapprehend the nature of rule 23(a)(3)'s requirement. Although the Advisory Committee's notes, Proposed Amendments to Rules of Civil Procedure for the United States District Courts, 39 F.R.D. 69, 100 (1966), do little to illuminate this aspect of the rule, decisional law has made clear that whether or not it has independent significance the importance of the typicality requirement lies in assuring that the named plaintiffs will adequately represent those who are unnamed. *Rosado* v. *Wyman,* 322 F. Supp. 1173, 1193 (E.D.N.Y.), *aff'd* 437 F.2d 619 (2d Cir. 1970), *aff'd,* 402 U.S. 991, 91 S. Ct. 2169, 29 L. Ed.2d 157 (1971). Differences in the degree of harm suffered, or even in the ability to prove damages, *Sanders* v. *Faraday Laboratories, Inc.,* 82 F.R.D. 99, 101 (E.D.N.Y. 1979), do not vitiate the typicality of a representative's claims. Typicality, therefore, should be evaluated in terms of the plaintiffs' claims as to liability. *Id.,* cases cited therein.

With this in mind, we find the named plaintiffs' claims typical of the classes they seek to represent. Proof of defendant's liability for the alleged pollution of the air and Lake Champlain will benefit all members of the proposed classes, *Eisen;* that the damages, if any, may reach a de minimis level at some point among the class members does not make the named plaintiffs' claims atypical.

The last prerequisite of rule 23(a) is that the representatives must fairly and adequately protect the interests of the class. Of considerable importance to our finding on this issue is the compjetence of plaintiffs' counsel, *Eisen,* 391 F.2d at 562, which defendant concedes. We concur. Nevertheless, defendant contends that issues going to proof of damages will create antagonism among the class members making their representation by plaintiffs inadequate. This

contention is easily disposed of by noting that there is no necessity that all issues be tried in one proceeding. The class aspects may be tried before the individual damages claims, if that should prove necessary. *See In re Caesars Palace Securities Litigation,* 360 F. Supp. 366, 399 (S.D.N.Y. 1973) (individual questions of reliance and damages not fatal to class action charging securities violations); *Dolgow* v. *Anderson,* 43 F.R.D. 472, 490 (E.O.N.Y. 1968) (common issues need not dispose of entire litigation).

Thus we find that the proposed classes satisfy the prerequisites of rule 23(a).

2. Maintenance of 23(b)(3) action.

Defendant's most strenuous objection to certification of these classes relates to the rule 23(b)(3) elements. To maintain an action under subdivision (b)(3), plaintiffs must demonstrate, and the court must find, that common questions of fact of law predominate and that a class action is superior to other methods available for fair and efficient adjudication of the controversy. Defendant contends that neither of these characteristics obtains in this case.

Defendant's contentions also go to the heart of an emerging and important question concerning the propriety of class action as a procedure for redressing environmental injury. This question has lurked in the background of the few decisions we have found involving claims similar to those of the instant case, but it has not been addressed directly, so far as we have been able to determine. In cases of this kind the allegedly harmful discharges are released into the environment in a concentrated state at a source. They disperse thereafter in a manner dictated by natural forces, and their effect, if any, on the surrounding environment is necessarily a function of proximity to the source and prevailing natural conditions. Because of this, no two property owners at random points in an affected area are likely to urge the

same pattern of dispersion. Defendant points this out and argues from it that plaintiffs' claims are therefore atypical and that plaintiffs are unable because of their individual interests to protect fairly and adequately the interests of the class. This assertion reduces itself inexorably to the proposition that a class action may never proceed against an alleged polluter; defendant's [illegible] would almost invariably disqualify each would-be [illegible]mber from representing the proposed class. Therefore, before proceeding with our analysis of subdivision (b)(3), we feel constrained to respond to defendant's assertion and examine the general proposition to which it leads.

The function of subdivision (b)(3) is to reach the group of cases for which class treatment would be inappropriate under the (b)(1) or (b)(2) categories but would be convenient and desirable nevertheless. In the Advisory Committee's words, subdivision (b)(3) was intended for "those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." Proposed Amendments, 39 F.R.D. at 102-03.

The Advisory Committee felt that some categories of cases, mass accidents for instance, would be inappropriate for class action because of the likelihood of individual questions of liability and defenses to liability. *Id.* at 103. The same might be true of certain kinds of private damage antitrust cases. *Id.* We find the Committee's inclusive language more descriptive of the kind of case presently before us than its exclusive language. We have not found a case to suggest the contrary. We conclude that as a genre the instant case is not inappropriate for class treatment and we reject the implication of defendant's argument. As a theoretical matter, we find, for instance, that it would be

desirable from the standpoint of consistency and convenience to develop in a single proceeding the quantum, quality and dispersion pattern of a source's discharges. Time, effort and expense might be saved by such a procedure, even though all issues may not be resolvable at once. In separate trials the questions of fact respecting defendant's discharges and their dispersion might be resolved inconsistently, contrary to sense and logic. Similar inconsistency could arise with separately determined questions of liability or defenses to liability, and this would be undesirable as a matter of "uniformity of decision as to persons similarly situated." *Id.* In our opinion the type of suit represented by this case is not the sort envisioned by the Advisory Committee as generally inappropriate for class treatment under subdivision (b)(3). *See also* Weinstein, *Some Reflections on the "Abusiveness" of Class Actions,* 58 F.R.D. 299, 305 (suggesting the propriety of class action in the area of environmental control). There are fundamental differences between the case plaintiffs bring and the "mass accident" case that concerned the Advisory Committee, which we will discuss below. But what is important at this point in our discussion is that the Advisory Committee felt the considerations of rule 23(b)(3) were fatal to class treatment of a "mass accident," whereas defendant in effect is urging that the considerations of rule 23(a) are fatal to class treatment of the instant sort of case. We have found no support for such a conclusion in law or logic, and we find it contrary to the thinking behind rule 23.

It remains, then, for us to consider whether the instant case satisfies the two requirements of subdivision (b)(3).

Predominance of Common Questions of Law and Fact

Defendant's position is that the differences among the proposed classes' members do not relate merely to the

damages each claims, but go to the issue of IPC's liability for the claimed damages. In defendant's view this is a case in which liability is a separate issue as to each member of the proposed classes, which makes individual questions predominate over the common ones. The cases that it cites in support of this contention are mostly cases where the actual definition of the proposed class depended on individual findings of liability. In *Pendleton* v. *Trans Union Systems Corp.*, 76 F.R.D. 192 (E.D. Pa. 1977), the court denied certification of a class of consumers who were denied credit because of errors in the defendant's credit reports. The court observed that because there could be no liability without an erroneous or inaccurate credit report it would not be possible to establish liability as to an entire class without resolving separate questions about individual reports. This was not a case such as *Biechele* v. *Norfolk & Western Railway Co.*, 309 F. Supp. 354 (N.D. Ohio 1969), where in the *Pendleton* court's opinion, "geographic limitations defined the class in such a way that the Court could conclude that all of the plaintiffs were injured in various respects and to various extents by the defendant's operations." *Pendleton*, 76 F.R.D. at 195.

Yandle v. *PPG Industries, Inc.*, 65 F.R.D. 566 (E.D. Tex. 1974) is to the same effect. The plaintiffs sought certification of a class of former employees and survivors of former employees allegedly suffering illness and death from exposure to asbestos in the defendant's plant. The court denied certification because among the class there were varying periods of exposure to varying concentrations of asbestos; some may have had pre-existing illnesses; and individual questions existed as to the availability and use of safety devices, and the availability of affirmative defenses such as the statute of limitations. In short, the uncommon questions bearing on the defendant's liability at

all to each class member were predominant. Viewed another way, this was a case where, as in *Pendleton*, the class of those to whom the defendant would be liable could not be defined without separate trials on the liability issues.

In *Boring* v. *Medusa Portland Cement Co.*, 63 F.R.D. 78 (M.D. Pa.), *appeal dismissed*, 505 F.2d 729 (3d Cir. 1974), residents of York County, Pennsylvania, sought to maintain a class action for damages and injunctive relief against two defendant corporations whose operations released contaminants into the air. The court denied class certification, observing that the only common fact alleged by the claims of the proposed class was that their damages were caused by the same source. *Id.* at 84. The variety of types of damage alleged made a single finding of liability impossible in a single mass proceeding. *Id.* at 85.

Unlike these and the "mass accident" cases defendant cites, the water class in the present case offers a geographically discrete group asserting theoretically consistent claims as to which individual defenses to liability do not appear. Identical evidence would be required in each individual's case to determine whether IPC pollutes Lake Champlain and is liable to lakeshore owners and lessees whose property values and enjoyment, including recreational use, are diminished thereby. *See Hernandez* v. *Motor Vessel Skyward*, 61 F.R.D. 558 (S.D. Fla. 1973), *aff'd*, 507 F.2d 1278 (5th Cir. 1975) (class treatment of defendant's negligence in supplying contaminated food and water for cruise passengers' consumption); *American Trading and Production Corporation* v. *Fischbach & Moore, Inc.*, 17 F.R.D. 155 (N.D. Ill. 1969) (class treatment of defendant's negligent handling of electrical wiring in exhibition hall resulting in fire damage to exhibitors' goods). Moreover, the water class in this case differs fundamentally from the "mass tort" class that the Advisory Committee considered inappropriate

for certification: there are no personal injuries claimed and there are no individual defenses asserted. *See* Judge Steger's discussion in *Yandle*, 65 F.R.D. at 569.

We find that in a class treatment of the facts respecting IPC's discharges and its liability for diminished property value and enjoyment of use caused thereby, common questions will predominate.

We do not, however, find that this is so as to the entire proposed water class. The Town of Addison fronts on a lake that is markedly different from that which meets the Towns of Bridport and Shoreham. Addison lies north of the Crown Point Bridge in an area known locally as the "broad lake," which is deeper and composed of water that is of a generally different quality than that of the "south lake" where Bridport and Shoreham are located. In addition, none of the proposed class representatives resides in Addison, which raises doubts about the adequacy of Addison residents' representation. We conclude, therefore that a water class comprised of all three towns' lakeshore property owners would be inappropriate. Thus we limit our final conclusions about the propriety of a water class to those proposed class members residing in Shoreham and Bridport.

The proposed air class presents a somewhat different picture. This class is more like that proposed and denied in *Boring*, where the "nature of the differing injuries runs the gamut from damage to fee simple and leasehold interests in real estate to damaged personalty, unpleasant surroundings and . . . compensable personal injury." *Boring*, 63 F.R.D. at 84-85. Defendant would no doubt offer separate defenses to the claims of impaired health, and such claims are likely to be the kind that individuals have an interest in prosecuting s parately. Fed. R. Civ. P. 23(b)(3)(A). *See Yandle*, 65 F.R.D. at 572 ("[M]embers of the purported class have a vital interest in controlling their own litigation because it

involves serious personal injuries . . . ."). There is no " 'common nucleus of operative facts,' " *Eisen*, 391 F.2d at 566 (citing *Siegel* v. *Chicken Delight Inc.*, 271 F. Supp. 722 (N.D. Cal. 1967)), that unites the liability claims of this proposed class as there is in the water class. Whereas the pollution of the lake may uniformly limit the enjoyment and decrease the value of all lakeshore property because the lake is a common source of recreation, the same may not be said of air pollution's effect on the inland property. For instance, unpleasant odors may not affect the value of a dairy farm, if at all, in the way they would a strictly residential area. The various uses to which property is put in the area of the proposed air class makes class treatment of property damage claims as inappropriate as class treatment of health impairment claims. We find that common questions of law and fact will not predominate in a class treatment of the air class's claims and we therefore deny certification of the air class.

Superiority of Class Action

We have considered the matters pertinent to our findings under subdivision (b)(3), Fed. R. Civ. P. 23(b)(3)(A)-(D), and the alternative methods for handling this litigation, and we find that class treatment of the water class's claims would be superior. The claims are not such that class members would be interested in individual prosecution, we are aware of no litigation currently under way that involves this controversy, the desirability of uniform decisions respecting the class's claims counsels for concentrating the claims in a single forum, and the proposed class presents no management difficulties as the class is finite and easily identifiable. The alternatives of joinder and intervention do not offer the simplicity and conclusiveness of proceeding with these claims as a class action. IPC may offer its

defenses in one forum at one time and, if successful, can put an end to this kind of litigation over the polluting effects of its discharges. The class members can pool their resources, present their most effective case in one proceeding and share the benefits if they succeed.

We conclude that the water class, as limited, meets the requirements of rule 23 and certify the lakeshore owners in the Towns of Bridport and Shoreham as a class to maintain this suit.

3. Notice

Rule 23(c)(2) requires that the court direct to the class members the best notice practicable under the circumstances. This includes individual notice to those members who can be identified through reasonable effort. It appears that the class members in this case can be identified rather easily through town records, and we direct plaintiffs to determine who the individual class members are within twenty-one days from the date of this order. Within the same period, plaintiffs and defendant are directed to prepare jointly a draft of a proposed notice to the class members and submit it to the court for its consideration. SO ORDERED.

Dated at Burlington in the District of Vermont, this twenty fourth day of April, 1980.

/s/ ALBERT W. COFFRIN

.....

Albert W. Coffrin
Chief Judge

Notice of Motion to Dismiss

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF VERMONT

Civil Action—File No. 78-163

HARMEL OUELLETTE, et al.

v.

INTERNATIONAL PAPER COMPANY

NOW COMES Defendant International Paper Company by and through their attorneys, Dinse, Allen & Erdmann, and pursuant to Rules 12(c) and 56(b) of the Federal Rules of Civil Procedure, move this Court for an order dismissing plaintiffs' First Cause of Action.

Dated: Burlington, Vermont
June 22, 1981

DINSE, ALLEN & ERDMAN, ESQS.
209 Battery Street
Burlington, Vermont

BY: /s/ JOHN M. DINSE

.....

A Member of the Firm

DAVIS POLK & WARDWELL, ESQS.
1 Chase Manhattan Plaza
New York, N.Y. 10005

BY: /s/ JAMES W.B. BENKARD
.....
A Member of the Firm

Attorneys for Defendant
International Paper
Company

To:

PETER F. LANGROCK, ESQ.
Langrock, Sperry, Parker and Stahl
P.O. Drawer 351
Middlebury, Vermont 05753

FEDERICK deG. HARLOW, ESQ.
Smith, Harlow & Liccardi
110 Merchants Row
P.O. Box 323
Rutland, Vermont 05701

Affidavit of Dana B. Dolloff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT
Civil Action—File No. 78-163

HARMEL OUELLETTE, et al.

v.

INTERNATIONAL PAPER COMPANY

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

DANA B. DOLLOFF, being duly sworn, deposes and says:

1. For approximately sixteen years, I have been an employee of defendant International Paper Company ("IPCo.") and I make this affidavit in support of IPCo.'s motion to dismiss the First Cause of Action stated in this lawsuit.

2. From 1969 to 1972, I served as Supervisor of Air and Water Management for IPCo.'s operations in and around Ticonderoga, New York. From 1967 until 1972, I was involved in the design, construction, and initial operation of IPCo.'s paper mill located approximately three miles north of the Village of Ticonderoga. Thereafter, I was transferred to the corporate environmental staff of IPCo. at its headquarters in New York City, where I was Coordinator of Air/Water Programs. As Coordinator, I participated extensively in the continuing operations of the Ticonderoga Mill, including assisting in IPCo.'s defense

in the trial of *Vermont* v. *New York and International Paper Company* (Original Number 50, United States Supreme Court). When that suit terminated in 1974, I continued to have extensive contacts with the Ticonderoga Mill and, in particular, I was one of IPCo.'s representatives in the negotiations with the various state and federal agencies concerning that Mill which culminated in the issuance of a National Pollutant Discharge Elimination System permit in 1977. Set forth below is a chronology of the judicial and administrative proceedings involving the Ticonderoga Mill between 1970 and 1977.

The Supreme Court Action

3. In December 1970, the State of Vermont instituted an action in the United States Supreme Court against the State of New York and International Paper Company. The claims made and the relief sought in the original complaint related only to the discharges of another paper mill (the "Old Mill") owned and operated by IPCo. in the Village of Ticonderoga itself. That Mill had ceased operations prior to the institution of the Supreme Court case and IPCo. had already undertaken the construction of a new mill, three miles to the north of the Village of Ticonderoga. (It is the new mill which is the subject of this action.) The Supreme Court accepted the jurisdiction of the Vermont suit in 1972 and appointed a Special Master, R. Ammi Cutter, to hear the matter. The motion of the United States to intervene was granted; the Environmental Protection Agency ("EPA") joined the proceedings and participated throughout the ensuing trial and settlement negotiations.

4. Prior to trial, Vermont amended its complaint to add claims relating to the new mill, alleging that its air and water discharge constituted a nuisance and a trespass.

The Settlement Agreement

5. After nearly a year of trial, settlement negotiations commenced. The negotiations lasted several months and, on September 23, 1974 the parties reached an agreement which was subsequently approved by the Supreme Court (by granting a consensual motion to dismiss the complaint). A copy of the Stipulation and Order of Dismissal is attached hereto as Exhibit A. While disposing of Vermont's claims concerning the Old Mill, the settlement also stipulated that IPCo. would make further improvements to the new mill including increased air pollution control equipment and would accept limitations on the amount of certain substances that could be included in its liquid discharge to the southern portion of Lake Champlain (the "South Lake").

6. By way of information, the standard method of stating a limitation on the discharge of a particular substance in an effluent, is to prescribe a given limit on the amount of milligrams of the substance that may be allowed per liter of effluent (mg/1). That limitation is then converted into a daily poundage limit by multiplying the concentration by the average daily discharge in total gallons, or liters, of the effluent using appropriate conversion factors. Occasionally, the concentration standard (mg/1) is included as an additional, or alternative, limitation.

7. The settlement with Vermont provided that the amount of biochemical oxygen demand ("BOD") in the effluent should not exceed 4400 pounds per day as a monthly average* and the amount of phosphorus should not exceed a concentration of 0.5 mg/1 as a monthly average or 88 pounds per day as a monthly average, which-

---

* This limitation, which was already in the New York State permit under which IPCo. operated at that time, computes to approximately 25 mg/1.

ever was more restrictive. These limitations were agreed to by both the EPA and New York.

8. The agreement did not resolve all the issues between the parties concerning the content and nature of the liquid discharge from the new mill and the parties recognized that questions would be dealt with by "action of regulatory or executive agencies of the United States or the State of New York in the performance of their official duties." Exhibit A, Agreement of Settlement between The State of Vermont And International Paper Company, Article IV(H), at 000686-87. Among other obligations, IPCo. agreed to permit representatives of Vermont to make visits to the mill, inspect its facilities, interview its personnel, and take samples from the treatment system. *Id.*, II(G)(1) at 000677. The Company also agreed to provide Vermont with copies of all regular reports concerning its discharges that IPCo. submitted to the State of New York or the EPA. *Id.*, II(G)(4) at 000678.

Proceedings Involving The Issuance Of An NPDES Permit

9. Prior to the approval by the Supreme Court of the Settlement Agreement, the EPA took over the permitting process from New York State and, on May 15, 1974 issued to the mill a "draft" National Pollutant Discharge Elimination System (NPDES) permit pursuant to the Federal Water Pollution Control Act Amendments of 1972. Prior to that time, IPCo. had been operating under a permit issued by the New York State Department of Environmental Conservation.

10. The draft permit included a wide variety of limitations and standards, many of which were based upon regulations, promulgated by the EPA, incorporating effluent

limitations for all similar mills. The draft permit consisted of 26 pages and included: detailed limitations and prohibitions relating to discharges of various substances in the effluent; the manner of measuring for those substances; a schedule for compliance; methods of testing; instructions for reporting to the EPA; and directions for reporting and explaining instances of non-compliance, among other matters.* In accordance with the Settlement Agreement, the draft permit incorporated the limitations agreed upon by IPCo. and Vermont involving the discharge of biochemical oxygen demand and phosphorus.

11. As an "affected" state, Vermont received notice of the draft permit and responded in writing, stating 14 separate "conditions" that it demanded the permit included. IPCo. also submitted its comments and EPA subsequently circulated a revised permit on November 29, 1974.

12. On December 9, 1974, IPCo. formally requested an adjudicatory hearing concerning the need for or appropriateness of a number of the limitations and standards set forth in the most recent draft of the permit. Provisions of the permit not challenged by IPCo. became effective on January 27, 1975. EPA granted IPCo.'s request for an adjudicatory hearing and, thereafter, Vermont, New York and the Lake Champlain Committee (the principal private environmental organization in the Champlain Valley with a membership at that time of more than 2000) requested and were granted status as parties to the hearing.

13. While the parties had raised a number of issues for the hearing, the predominant question concerned the existing and proposed limitations upon the allowable amount of suspended solids in the discharge from the mill. The draft

* A copy of the final permit is attached hereto as Exhibit B.

permit specified an "interim" limitation on suspended solids —applicable until July 1, 1977—of 32,000 pounds a day as a daily average with a daily maximum of 48,000 pounds. As of July 1, 1977, the statutory deadline for application of standards based upon "best practicable treatment", the draft permit required that the daily average discharge of suspended solids be no greater than 6800 pounds, with a daily maximum of 16,320. IPCo. had no objection to the interim limitation as the mill's daily average discharge of suspended solids between 1974-1977 was approximately 17,000 pounds, or well under the 32,000 pound limit. IPCo. did object to the proposed 1977 standard, which was based upon the application to the mill of EPA's published (but still tentative) "Interim Effluent Guidance" applicable to all bleached kraft paper mills. The paper industry, including IPCo., contended that those effluent guidelines were unreasonably stringent and could not be achieved by best practical treatment. Vermont, on the other hand, took the position that the final standard should be enforced at 6800 pounds.

14. During 1975, representatives of all the parties attended a pre-hearing conference and, thereafter, IPCo. made available to Vermont, New York and EPA extensive information on its waste water treatment system. IPCo. also offered to meet whatever standard would result from application of the *Final* Effluent Guidelines (whenever they were finally promulgated) to the mill. Nevertheless, a settlement was not reached on the solids issue and in May, 1976 EPA informed the parties that an adjudicatory hearing would have to be held.

15. By the summer of 1976, the suspended solids standard in the EPA Interim Guidelines controlling July 1, 1977 standards for bleached kraft mills had been substantially relaxed. Application of those guidelines to the Ticonderoga

Mill would have allowed a daily average discharge of over 16,000 pounds per day as an average. On August 10, 1976, however, the New York Department of Environmental Conservation certified the southern part of Lake Champlain as "water quality limited". This designation allowed the regulatory agencies to impose a stricter standard upon the Ticonderoga Mill than would pertain to other mills discharging into non-water quality limited bodies of water. Representatives of New York, EPA, and Vermont consulted and came to the conclusion that a limitation of 10,000 pounds per day of suspended solids should be required for the Ticonderoga Mill discharge as of July 1, 1977. Hence, the suspended solids limits (as well as BOD, for that matter) would be based on both the state and federal agency determinations of discharge levels appropriate to protect the water quality of Lake Champlain.

16. At the instance of IPCo., the parties met again to try and reach a settlement of the solids issue which would obviate the need for a hearing. At this time, IPCo. was achieving an average daily discharge of approximately 14,000 pounds of suspended solids—thereby already bettering the standard (16,000 pounds) which would not apply to the industry until the following year. IPCo.'s experts and consultants reached the view, however, that the existing system, which required the addition of $700,000 a year in chemicals (chiefly alum) to enhance removal of solids, was not capable of achieving the 10,000 pounds standard on a regular basis. Thus, IPCo. proposed a radical solution: the installation of a $3,000,000 addition to its waste water treatment system consisting of two large reactor-type clarifiers with associated equipment. With these improvements, it was anticipated that the waste water treatment system could meet a standard of 10,000 pounds.

17. The proposed time schedule for design and construction of this addition called for a one-year pilot study from October 1976 to October 1977 and two years for engineering and construction, running from October 1977 to October 1979. As IPCo. informed the parties to the proceeding, the pilot plant tests (the results of which would define the design of the system) could only be meaningful if the chemical (alum) addition to the treatment system was suspended for the duration of the pilot program. With the agreement of all parties, these tests commenced in October 1976, even before approval of the proposed settlement.

18. On November 23, 1976, all parties met at the New York Department of Environmental Conservation in Albany, New York to resolve the remaining issues concerning the NPDES permit for the new mill. At this meeting, the following agreement was reached: IPCo. would operate under an interim standard of 32,000 pounds of suspended solids as its daily average until July 1, 1977; from July 1, 1977, until the completion of construction of the new system (in 1979), the standard would be 17,000 pounds; and thereafter the standard would go down to 10,000 pounds. Once the parties reached a consensus on this point, the remaining issues were resolved swiftly.

EPA Issues An Environmental Compliance Schedule Letter

19. Because EPA took the position that it did not have the statutory authority to grant an extension of compliance with the 10,000 pound standard after July 1, 1977, the final permit provided that, notwithstanding the agreement among the parties, IPCo. would be required to meet the 10,000 pound standard as of July 1, 1977. As this would be impossible until completion of the tertiary system (not scheduled until 1979), IPCo. requested, and EPA subsequently issued with the concurrence of all parties (including Vermont), an Environmental Compliance Schedule Letter (ECSL). A copy of the ECSL is attached hereto as Exhibit C. This document contains a qualified commitment by EPA that it will not seek sanctions for technical violations of the suspended solids limitations in the permit after July 1, 1977 so long as IPCo. is undertaking good-faith efforts, pursuant to the program, to construct a facility which will enable it to meet the standards at issue.

20. On March 15, 1977, representatives of all parties met in New York for the formal signing of the stipulation embodying the parties settlement of the adjudicatory hearing which resulted in the issuance of a final permit issued to IPCo. High representatives of the state government of Vermont and New York attended as did senior officials from EPA. The ECSL was issued and the permit, as revised, became fully effective.

EPA Institutes Administrative Proceedings

21. As IPCo. had forewarned the parties, once it ceased the addition of alum to its waste water system in order that the pilot plant tests could be meaningful, the suspended solids, and, subsequently, the BOD readings in the discharge to the South Lake increased substantially. Before the system returned to equilibrium, there were violations of the interim standards set forth in the permit during the winter months of 1976-1977. On April 15, 1977 the EPA instituted an administrative proceeding by issuing "Findings of Violation and Order to Show Cause" seeking sanctions against IPCo. for the violations mentioned above.

22. IPCo. responded by noting that the violations were the inevitable result of necessary testing for the system that would achieve the rigid standards agreed to by the parties.

Settlement of EPA Proceeding

23. Representatives of all interested parties met in New York on May 6, 1977 to discuss the issue. Thereafter, on July 15, 1977, IPCo. and EPA settled the proceeding. In consideration of the dismissal of the proceeding and waiver of any monetary penalties, IPCo. agreed to reintroduce alum into the system (at an approximate cost of $60,000) on September 1, 1977 instead of October 1, 1977 (the end of the 12-month period originally contemplated as necessary for the pilot program).

24. Pursuant to the above Settlement Agreement between the parties, the daily average limitation dropped from 32,000 pounds to 17,150 pounds on September 1, 1977. IPCo. completed construction of the improvements to the waste water treatment system in October 1979, whereupon the limitation of 10,000 pounds took effect.

25. Having duly qualified under the Federal Water Pollution Control Act Amendments of 1972, commonly known as the Clean Water Act, 33 U.S.C. §§ 1251-1376 (1976) as a permit granting agency, New York State now administers the permit under the supervision of the EPA. Regular monthly reports on the performance of the waste water treatment system are sent to New York, EPA, and Vermont.

The Mill's Complicance With
The NPDES Permit

26. During the seven years of extensive regulation, negotiation, and technical innovations, the IPCo. mill has operated successfully under a permit incorporating discharge standards substantially more restrictive than those pertaining to any comparable mill in the country. Since October 1979, when the tertiary treatment system was in

operation, the mill's effluent has exceeded the BOD limit on one day (in December 1980) and the suspended solids limit on one day (in March 1980); pH was outside the permit limits for portions of four days (in February and March 1980 and February and March 1981) while the phosphate limit has not been exceeded.

/s/ DANA B. DOLLOFF

. . . . . .

Dana B. Dolloff

Sworn to before me this
22nd day of June, 1981.

(Signature Illegible)

. . . . . .

Exhibit A to Dolloff Affidavit

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973
No. 50 Original

STATE OF VERMONT, a sovereign state,
Montpelier, Vermont,
Plaintiff,

v.

STATE OF NEW YORK, a sovereign state,
Albany, New York

and

INTERNATIONAL PAPER COMPANY, a corporation existing under the laws of the State of New York, located at New York, New York,
Defendants.

UNITED STATES OF AMERICA,
Intervenor.

STIPULATION AND ORDER OF DISMISSAL

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

October 29, 1974

Hon. Kimberly B. Cheney
Attorney General of Vermont
Pavilion Office Bldg.
Montpelier, Vermont 05602

RE: Vermont v. New York et al., No. 50 Original

Dear Mr. Cheney:

Enclosed is a certified copy of the stipulation to dismiss the bill of complaint and order of dismissal, pursuant to Rule 60 in the above-entitled case.

Very truly yours,

MICHAEL RODAK, JR., Clerk
By Name Illegible

.....

(Mrs.) Evelyn R. Limstrong
Assistant

Enclosure

cc: Louis J. Lefkowitz, Esq. (w/encl)
Atty. General of N.Y.
2 World Trade Center
New York, N. Y. 10047

Taggart Whipple, Esq. (w/encl)
1 Chase Manhattan Plaza
New York, N. Y. 10005
Hon. Robert H. Bork (w/encl)

IN THE
SUPREME COURT OF THE UNITED STATES
No. 50, ORIGINAL

STATE OF VERMONT, a sovereign state,
Montpelier, Vermont,
Plaintiff,

v.

STATE OF NEW YORK, a sovereign state,
Albany, New York,

and

INTERNATIONAL PAPER COMPANY, a corporation existing under the laws of the State of New York, located at New York, New York,
Defendants.

UNITED STATES OF AMERICA.
Intervenor.

STIPULATION FOR DISMISSAL

It is hereby stipulated and agreed, by and between the attorneys of record for the respective parties hereto, that the amended complaint in this case be dismissed without prejudice pursuant to Rule 60 of the Rules of this Court. The parties have also reached agreement with respect to the payment of costs incurred in this case, as reflected in their joint Petition For An Order With Respect To Fee And Expenses Of Special Master, which is being filed with the Court concurrently with this Stipulation For Dismissal.

Dated: September 23, 1974

Respectfully submitted,

STATE OF VERMONT	STATE OF NEW YORK
/s/ KIMBERLY B. CHENEY	/s/ LOUIS J. LEFKOWITZ
Kimberly B. Cheney Attorney General of Vermont Pavilion Office Building Montpelier, Vermont 05602	Louis J. Lefkowitz Attorney General of New York 2 World Trade Center New York, N. Y. 10047
Attorney for Plaintiff State of Vermont	Attorney for Defendant State of New York
INTERNATIONAL PAPER COMPANY	UNITED STATES OF AMERICA
/s/ TAGGART WHIPPLE	/s/ ROBERT H. BORK
Taggart Whipple DAVIS POLK & WARDWELL 1 Chase Manhattan Plaza New York, New York 10005	Robert H. Bork Solicitor General of the United States Department of Justice Washington, D.C. 20530
Attorney for Defendant International Paper Company	Attorney for Intervenor United States of America

1974—October 29. The foregoing stipulation to dismiss the bill of complaint having been received by the Clerk

and no fees due, the bill of complaint is now here dismissed, pursuant to Rule 60 of this Court.

MICHAEL RODAK, JR.

.....

Clerk of the Supreme Court of the United States

(SEAL)

By /s/ FRANCIS J. LORSON
Deputy

A true copy MICHAEL RODAK, JR.
Test:
Clerk of the Supreme Court of the United States

By /s/ FRANCIS J. LORSON

.....

Deputy

SUPREME COURT OF THE UNITED STATES

OFFICE OF THE CLERK

WASHINGTON, D.C. 20543

October 29, 1974

Hon. Kimberly B. Cheney
Attorney General of Vermont
Pavilion Office Building
Montpelier, Vt. 05602

RE: VERMONT v. NEW YORK,
50 Original

Dear Sir:

The Court today entered the following order in the above-entitled case:

It is ordered by this Court that the Honorable R. Ammi Cutter be, and he is hereby, awarded the sum of $50,000 as compensation for his services as Special Master in this case, and that his disbursements totaling $5,150 be allowed. It is further ordered that the fee and disbursements be paid by the parties in the following amounts: $20,000 by the State of Vermont and $35,150 by the International Paper Company.

It is further ordered that the Special Master is hereby discharged.

cc: Hon. Louis J. Lefkowitz
Atty. Gen. of New York

Taggart Whipple, Esq.
DAVIS, POLK & WARDWELL

Very truly yours,

Hon. Robert H. Bork
Solicitor General of U.S.

MICHAEL RODAK, JR.,
Clerk

Hon. R. Ammi Cutter
Special Master in 50 Original
62 Sparks St.
Cambridge, Mass 02138

By

/s/ HELEN TAYLOR
.....
Helen Taylor, (Mrs.)
Assistant Clerk

September 23, 1974

Mr. Michael Rodak, Jr.
Clerk

Supreme Court of the United States
Washington, D.C. 20543

RE: STATE OF VERMONT v. STATE OF NEW YORK, et al.
No. 50 Original

Dear Mr. Rodak:

In Part II of its June 3, 1974 Opinion in the above case, the Court suggested that settlement of this case might be achieved by agreement of the parties and that "such a settlement might be the basis for a motion to dismiss the complaint. Cf. 32., Orig., *Missouri* v. *Nebraska*, decided May 28, 1974, U.S. ."

Such an agreement has now been reached, which will not involve any continuing supervision by the Court with respect to this matter. This agreement is embodied in two "Agreements of Settlement", copies of which are enclosed.

The parties therefore respectfully submit the enclosed Stipulation For Dismissal of this case pursuant to Rule 60 of the Rules of the Court, along with a separate Stipulation Concerning Transcript And Exhibits.

The parties have also reached agreement with respect to the payment of costs incurred in this case. This agreement is embodied in the parties' joint Petition For An Order With Respect To Fee And Expenses Of Special Master, which is being filed concurrently with the Stipulation For Dismissal.

Thank you for your attention in this matter.

Yours truly,

/s/ KIMBERLY B. CHENEY	/s/ LOUIS J. LEFKOWITZ
Kimberly B. Cheney Attorney General of Vermont Pavilion Office Building Montpelier, Vermont 05602 Attorney for Plaintiff State of Vermont	Louis J. Lefkowitz Attorney General of New York 2 World Trade Center New York, N. Y. 10047 Attorney for Defendant State of New York
/s/ TAGGART WHIPPLE	/s/ ROBERT H. BORK
Taggart Whipple DAVIS POLK & WARDWELL 1 Chase Manhattan Plaza New York, New York 10005 Attorney for Defendant International Paper Company	Robert H. Bork Solicitor General of the United States Department of Justice Washington, D.C. 20530 Attorney for Intervenor United States of America

IN THE
SUPREME COURT OF THE UNITED STATES
No. 50, ORIGINAL
October Term, 1974

STATE OF VERMONT, a sovereign state,
Montpelier, Vermont,
Plaintiff,

v.

STATE OF VERMONT, a sovereign state,
Albany, New York,

and

INTERNATIONAL PAPER COMPANY, a corporation existing under the laws of the State of New York, located at New York, New York,
Defendants.

UNITED STATES OF AMERICA,
Intervenor.

PETITION FOR AN ORDER WITH RESPECT TO FEE AND EXPENSES OF SPECIAL MASTER

STATE OF VERMONT

Kimberly B. Cheney
Attorney General of Vermont
Pavilion Office Building
Montpelier, Vermont 05602

Attorney for Plaintiff
State of Vermont

STATE OF NEW YORK

Louis J. Lefkowitz
Attorney General of New York
2 World Trade Center
New York, N. Y. 10047

Attorney for Defendant
State of New York

INTERNATIONAL PAPER COMPANY

Taggart Whipple
DAVIS POLK & WARDWELL
1 Chase Manhattan Plaza
New York, New York 10005

Attorney for Defendant
International Paper Company

UNITED STATES OF AMERICA

Robert H. Bork
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

Attorney for Intervenor
United States of America

IN THE
SUPREME COURT OF THE UNITED STATES
No. 50, ORIGINAL
October Term, 1974

STATE OF VERMONT, a sovereign state,
Montpelier, Vermont,

Plaintiff,

v.

STATE OF NEW YORK, a sovereign state,
Albany, New York,

and

INTERNATIONAL PAPER COMPANY, a corporation existing under the laws of the State of New York, located at New York, New York,

Defendants.

UNITED STATES OF AMERICA,

Intervenor.

PETITION FOR AN ORDER WITH RESPECT TO FEE AND EXPENSES OF SPECIAL MASTER

WHEREAS, the parties hereto have settled this case by agreement and moved to dismiss the amended complaint in this case pursuant to Rule 60 of the Rules of this Court; and

WHEREAS, there being no further necessity or occasion for the services of Hon. R. Ammi Cutter, appointed by the Court as Special Master in this case; and

WHEREAS, the parties have been authorized by Hon. R. Ammi Cutter to state that he has read and has no objection with respect to this Petition:

NOW, THEREFORE, the parties hereto respectfully petition the Court to enter an order with respect to the fee and expenses of Hon. R. Ammi Cutter, appointed by the Court as Special Master in this case, on the following terms:

> The fee to be awarded Hon. R. Ammi Cutter as compensation for his services as Special Master in this case shall be in the amount of Fifty Thousand Dollars ($50,000). This amount shall be paid as follows: Twenty Thousand Dollars ($20,000) by the State of Vermont and Thirty Thousand Dollars ($30,000) by International Paper Company.
>
> The actual expenses of Hon. R. Ammi Cutter incurred in connection with his services as Special Master in this case, totaling Five Thousand One Hundred Fifty Dollars ($5,150), are allowed. This amount shall be paid by International Paper Company.

Dated: September 23, 1974

Respectfully submitted,

STATE OF VERMONT

/s/ KIMBERLY B. CHENEY

Kimberly B. Cheney
Attorney General of Vermont

Pavilion Office Building
Montpelier, Vermont 05602
Attorney for Plaintiff
State of Vermont

STATE OF NEW YORK

/s/ LOUIS J. LEFKOWITZ

Louis J. Lefkowitz
Attorney General of New York
2 World Trade Center
New York, N. Y. 10047
Attorney for Defendant
State of New York

INTERNATIONAL PAPER COMPANY

/s/ TAGGART WHIPPLE

Taggart Whipple
DAVIS POLK & WARDWELL
1 Chase Manhattan Plaza
New York, New York 10005

Attorney for Defendant
International Paper
Company

UNITED STATES OF AMERICA

/s/ ROBERT H. BORK

Robert H. Bork
Solicitor General of the
United States
Department of Justice
Washington, D.C. 20530

Attorney for Intervenor
United States of
America

IN THE
SUUPREME COURT OF THE UNITED STATES
No. 50, ORIGINAL

STATE OF VERMONT, a soveriegn state,
Montpelier, Vermont,
Plaintiff,

v.

STATE OF VERMONT, a sovereign state,
Albany, New York,

and

INTERNATIONAL PAPER COMPANY, a corporation existing under the laws of the State of New York, located at New York, New York,

Defendants.

UNITED STATES OF AMERICA,
Intervenor.

STIPULATION CONCERNING TRANSCRIPT AND EXHIBITS

It is hereby stipulated and agreed, by and between the attorneys of record for the respective parties hereto, as follows:

1. One copy of the transcript of the testimony in No. 50, Original, together with a compilation of all requests for transcript corrections made to the court stenographer prior to November 1, 1974, shall be preserved and maintained as a public record by the State of Vermont.

2. Prior to November 1, 1974, the parties shall file with the Clerk of the United States Supreme Court a stipulation listing the exhibits received in evidence in No. 50, Original and stating which party shall maintain custody of each such exhibit.

Dated: September 23, 1974

Respectfully submitted,

STATE OF VERMONT

/s/ KIMBERLY B. CHENEY

Kimberly B. Cheney
Attorney General of Vermont
Pavilion Office Building
Montpelier, Vermont 05602

Attorney for Plaintiff
State of Vermont

STATE OF NEW YORK

/s/ LOUIS J. LEFKOWITZ

Louis J. Lefkowitz
Attorney General of New York
2 World Trade Center
New York, N. Y. 10047

Attorney for Defendant
State of New York

INTERNATIONAL PAPER COMPANY

/s/ TAGGART WHIPPLE

Taggart Whipple
DAVIS POLK & WARDWELL
1 Chase Manhattan Plaza
New York, New York 10005

Attorney for Defendant
International Paper Company

UNITED STATES OF AMERICA

/s/ ROBERT H. BORK

Robert H. Bork
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

Attorney for Intervenor
United States of America

AGREEMENT OF SETTLEMENT

BETWEEN

THE STATE OF VERMONT

AND

INTERNATIONAL PAPER COMPANY

TABLE OF CONTENTS

AGREEMENT OF SETTLEMENT

BETWEEN

THE STATE OF VERMONT

AND

INTERNATIONAL PAPER COMPANY

AGREEMENT, made this 23rd day of September, 1974 between the State of Vermont and International Paper Company;

WHEREAS, by *per curiam* Opinion, dated June 3, 1974, the Supreme Court of the United States declined to approve a proposed consent decree signed on April 24, 1974 by counsel for each of the parties (including the intervenor) in *Vermont* v. *New York et al.*, No. 50, Original, for reasons more fully stated in the Opinion;

WHEREAS, the Court in Part II of that Opinion stated:

> "A settlement of this interstate dispute by agreement of the parties is another alternative. Once a consensus is reached there is no reason, absent a conflict with an interstate compact, why such a settlement would not be binding. And such a settlement might be the basis for a motion to dismiss the complaint. Cf. 32 Orig., *Missouri* v. *Nebraska*, decided May 28, 1974, U.S. ."

WHEREAS, all parties to No. 50, Original desire to settle that action in the manner suggested in the above-quoted language of the Court's Opinion and to file a Motion to Dismiss without prejudice the amended complaint in No. 50, Original on the basis of the settlement set forth, in part, in this Agreement; and

WHEREAS, all parties to No. 50, Original have, contemporaneously with the execution of this Agreement by the State of Vermont and International Paper Company, executed a separate agreement upon which the Motion to Dismiss will also be based;

NOW, THEREFORE, the State of Vermont and International Paper Company (hereinafter collectively referred to as the "parties" to this Agreement) hereby stipulate and agree that this Agreement may be filed with the Clerk of the Supreme Court of the United States as the basis, in part, for a Motion to Dismiss the amended complaint in No. 50, Original. In the event that the Motion to Dismiss the amended complaint in No. 50, Original is not granted, this Agreement, the Appendix annexed hereto, and accompanying documents executed in connection with this Agreement shall be of no effect whatsoever in No. 50, Original or any other litigation, proceeding, or otherwise, and the making of this Agreement, the Appendix annexed hereto, and accompanying documents shall not in any manner prejudice any consenting signatory in No. 50, Original or any other litigation, proceeding, or otherwise. This Agreement shall constitute a contract in settlement of No. 50, Original but shall not constitute an adjudication or finding on any issue of fact or law, or evidence or admission by any party with respect to any such issue raised therein. In consideration of the mutual rights and obligations herein set forth, the following provisions are agreed to and accepted by the parties and shall be binding upon them respectively.

I. *Definitions*

Whenever used or referred to in this Agreement, unless a different meaning appears clearly from the context:

(A) "The Company" means International Paper Company, a New York corporation, having its principal office at 220 East 42nd Street, New York, New York, and its successors and assigns, including any person, corporation, or other entity that succeeds to the business of International Paper Company;

(B) "Agreement" means this Agreement executed and consented to by the parties, including the Schedules and any amendments made from time to time, but does not include the document annexed hereto and marked as Appendix A;

(C) "BOD_5" means the five-day biochemical oxygen demand of the process waste water effluent, as measured by method No. 219 set forth at pages 489, et seq., of *Standard Methods for the Examination of Water and Wastewater* (13th ed.), or any other method agreed upon by the parties;

(D) "Daily arithmetic average" means the result obtained by (1) calculating the area under the curve generated by an automatic recording device for a period of twenty-four hours and dividing that area by the time span considered, or (2) any other equally accurate method of computation;

(E) "Federal Water Pollution Control Act" means Public Law No. 92-500, 86 Stat. 816, as heretofore amended;

(F) "New Mill" means the land, buildings, equipment, and materials, including any additions or modifications thereto, at the manufacturing and waste treatment system sites owned and used by the Company and located approximately four miles north of the Village of Ticonderoga, New York;

(G) "Old Mill" means the land, buildings, equipment, and materials, including any additions or modifications thereto, located in the Village of Ticonderoga, New York, owned and formerly operated as a kraft pulp and paper mill by the Company, but does not include the dam and certain contiguous property specified in Chapter 675 of the Laws of 1973 of the State of New York;

(H) "Process waste water effluent" means any water that comes into direct contact with, or results from the production or use of, any raw material, intermediate product, finished product, byproduct, or waste product during manufacturing or processing, as discharged to South Lake Champlain from the New Mill;

(I) "South Lake Champlain" means that portion of Lake Champlain extending from Whitehall, New York to the Lake Champlain Bridge near Crown Point, New York;

(J) "Thermal oxidation" means the process of raising the temperature of a gas stream to 1500°F. or more, with a residence time of one-half a second or more;

(K) "Total phosphorus (as P)" means all of the phosphorus present in the process waste water effluent; and

(L) "Twenty-four hour composite sample" means a sample collected over a continuous 24-hour period, consisting of not less than twelve individual samples of equal volume taken at two-hour intervals during the 24 hours of sampling.

II. *Obligations of the Company*

(A) With respect to the Old Mill, the Company, and any person, corporation, or other entity that acquires ownership or control of, or a recordable interest in, the Old Mill, shall continue hereafter to refrain and desist from all discharges of process and sanitary waste water and air emissions originating from the Old Mill, except discharges and emissions receiving the necessary approvals from federal, State of New York, and local authorities. The Company shall not be liable, however, for any actions in which it has not participated and which are taken in contravention of the terms of this paragraph if the person, corporation, or other entity taking such actions has actual or constructive notice of this paragraph. This paragraph shall be set forth or incorporated by reference in any deed, lease, or other recordable instrument of conveyance of the Old Mill, and in any agreement whereby there is a change of ownership or control of the Old Mill, and shall be cast as a restrictive covenant running with the land.

(B) It shall take such actions with respect to the bark pile (located on the north shore of Ticonderoga Creek approximately one-half mile northeast of the Old Mill) as are provided in Schedule 2.

(C) It shall take such actions with respect to New Mill air emissions as are provided in Schedule 3.

(D) It shall take such actions with respect to New Mill water discharge as are provided in Schedule 4.

(E) With respect to the New Mill, the Company, and any person, corporation, or other entity that acquires ownership or control of, or a recordable interest in, the New Mill, shall set forth or incorporate

by reference the provisions of this Agreement applicable to the New Mill in any deed, lease, or other recordable instrument of conveyance of the New Mill, and in any agreement whereby there is a change of ownership or control of the New Mill, and such provisions shall be cast as restrictive covenants running with the land. The Company shall not be liable, however, for any actions which contravene the provisions of this Agreement applicable to the New Mill and in which it has not participated if the person, corporation, or other entity taking such actions has actual or constructive notice of such provisions.

(F) Within 60 days after the entry of an order dismissing the amended complaint in No. 50, Original, the Company shall pay to the State of Vermont the sum of $500,000. This money shall be paid by the Company and received by the State of Vermont as a contribution by the Company to the State of Vermont, to be used in the future solely for the purpose of protecting and preserving the natural environment of the Lake Champlain basin, and shall be maintained by the State of Vermont in a segregated account for this express purpose; provided, however, that the State of Vermont shall have sole discretion as to the manner in which the contribution is to be used for the foregoing purpose. This contribution shall not create a trust.

(G) The Company shall:

(1) permit official representatives of the State of Vermont, at reasonable times, on reasonable notice, and in a reasonable manner, to inspect and take samples from the pollution control facilities at the New Mill and to inspect and copy records

related thereto that are not privileged, and to interview the persons responsible therefor, in order to determine the effectiveness of operation of such facilities;

(2) take appropriate steps to inform its directors and responsible officers of the contents of this Agreement and Appendix A annexed hereto;

(3) provide expanded technical training and instructional courses (including refresher courses where appropriate) for all personnel engaged in the operation of the pollution control facilities at the New Mill, and provide instructional memoranda and bulletins with respect to the proper operation of such facilities; and

(4) provide to the State of Vermont: (a) a copy of each report with respect to process waste water effluent and air emissions from the New Mill that the Company regularly submits to the State of New York or to the United States, at the same time that it submits such reports to the State of New York or the United States, and (b) a monthly summary of process waste water effluent data, in the same format and containing the same information that has been supplied to the parties during No. 50, Original, by the last day of the month following that month for which the summary has been compiled.

III. *Obligations of the State of Vermont*

(A)(1) Within 60 days after the entry of an order dismissing the amended complaint in No. 50, Original, Vermont shall deliver to the Company a separate, executed copy of the document annexed hereto as

Appendix A. The parties agree that Appendix A shall be construed and take effect as a covenant not to sue at common law in that: (a) it shall prevent the State of Vermont from proceeding against the Company in any manner or respect specified in Appendix A, and (b) it shall not have the effect of barring, diminishing, or affecting in any way any legal or equitable rights or claims, actions, suits, causes of action, or demands that the State of Vermont may have against the State of New York or any person other than the Company, except as the enforcement of the same may be precluded by subparagraph (2) of this paragraph. The parties agree not to assert in any litigation or proceeding or otherwise that Appendix A has any effect other than as stated in this subparagraph.

(2) Notwithstanding any provision of Appendix A or any reservation by the State of Vermont made therein and notwithstanding the fact that No. 50, Original is to be dismissed without prejudice, the State of Vermont shall not seek to recover from any party to No. 50, Original damages for harm to the South Lake, its waters, shores, adjacent areas, and the atmosphere above and near it, allegedly suffered on or prior to the entry of an order dismissing the amended complaint in No. 50, Original for which the State of Vermont could have sought recovery in No. 50, Original.

(B) The State of Vermont shall make available to the Company for inspection and copying, at the Company's expense, all financial records relating directly or indirectly to the contribution referred to in Article II(F) of this Agreement.

(C) The State of Vermont shall:

(1) submit to the Company by April 15 of each year, a written report describing the activities and studies relating to the natural environment of the South Lake Champlain basin that are contemplated to be undertaken by or for its Department of Water Resources during the following period of May 1—November 30;

(2) submit to the Company by February 15 of each following year, a written report describing all the activities and studies relating to the natural environment of the South Lake Champlain basin actually undertaken by or for its Department of Water Resources during the preceding period of May 1—November 30; and

(3) make available to the Company upon request, for inspection and copying of any documents, not privileged, relating in whole or in part to the activities and studies referred to in subparagraphs (1) and (2) of this paragraph.

(D) The State of Vermont shall:

(1) study and recommend control of septic tank, sewer, agricultural, and other discharges within the Vermont portion of the South Lake Champlain basin;

(2) study and recommend the enactment of legislation or the promulgation of regulations concerning the use of detergents in Vermont;

(3) submit annually to the Company a written report describing its activities undertaken pursuant to subparagraphs (1) and (2) of this paragraph; and

(4) make available to the Company, upon request, for inspection and copying, any documents, not privileged, relating in whole or in part to its activities undertaken pursuant to subparagraphs (1) and (2) of this paragraph.

(E) The State of Vermont shall take such steps as are necessary to inform the appropriate members of the Vermont State Government (including, without limitation, the appropriate officials of the Vermont Agency of Environmental Conservation) of the contents of this Agreement and Appendix A annexed hereto.

(F) Subject to the relief available pursuant to Section 1.5(b) of Schedule 1 of this Agreement and only with respect to the specific limitations in Sections 3.4 and 3.5 of Schedule 3 and Section 4.1 of Schedule 4:

(1) prior to January 1, 1983, the State of Vermont shall not propose or support any proposal that more stringent limitations than those set forth in Sections 3.4 and 3.5 of Schedule 3 and Section 4.1(b) of Schedule 4 be included in any permit issued or to be issued to the Company with respect to the New Mill; provided, however, that in the event that the Company at any time prior to January 1, 1983, proposes or supports any proposal that any limitation referred to in this subparagraph be made less stringent, the State of Vermont's obligations under this subparagraph shall not apply with respect to that limitation only; and

(2) prior to June 1, 1979, or the commencement of any administrative action with respect to the second National Pollutant Discharge Elimination

System (hereinafter referred to as the NPDES) permit to be issued to the Company with respect to the New Mill, whichever is earlier, the State of Vermont shall not propose or support any proposal that a more stringent limitation than that set forth in Section 4.1(a) of Schedule 4 be included in any permit issued or to be issued to the Company with respect to the New Mill; provided, however, that in the event that the Company at any time prior to June 1, 1979, proposes or supports any proposal that the limitation referred to in this subparagraph be made less stringent, the State of Vermont's obligation under this subparagraph shall not apply.

(G) The State of Vermont shall monitor, on a regular basis and in a scientifically acceptable manner, the water quality in that part of Lake Champlain from Chipman Point to the Lake Champlain Bridge near Crown Point, New York, and shall make the results of such monitoring available to the Company for inspection and copying upon reasonable request.

IV. *General Provisions*

(A) The provisions of this Agreement shall be applicable and limited to the activities of the Company at the Old and New Mills and shall not be construed as applicable to, or in any way providing a precedent with respect to, any other mill, installation, facility, or location.

(B) Subject to the provisions of Articles III(A)(2) and III(F), nothing herein (including, but not limited, to the emission and effluent limitations prescribed in Schedule 3 and Schedule 4 of this Agreement) shall be construed to affect the authority, if any,

of any regulatory or law enforcement authority with lawful jurisdiction:

(1) to regulate waste water discharges or air emissions from the Old Mill and the New Mill;

(2) to seek to abate the effects of such discharges or emissions; or

(3) to take such actions as are authorized by law to accomplish these ends (including, but not limited to, sampling at, or inspection of, the New Mill and the Old Mill).

(C) The provisions of this Agreement shall not be construed as, nor shall they operate as, an admission that the Company has or has not violated any law or regulation or otherwise committed a breach of duty at any time, and shall not constitute, in No. 50, Original or any other litigation or proceeding or otherwise, evidence or any implication of any such violation or breach of duty.

(D) Any testimony taken or any exhibit received in evidence in No. 50, Original shall be received in evidence, if otherwise relevant and admissible, in any hearing or proceeding between or among the parties and neither party shall object to the introduction of such testimony or exhibit on the ground that the offering party has failed to produce the witness to testify with respect to such testimony or to authenticate such exhibit. The parties, however, reserve their rights, if any, to move to strike all or any portion of any testimony taken and all or any portion of any exhibit received in evidence in No. 50, Original.

(E) Either party may file this Agreement for recording in the appropriate land records pertaining to the Old and New Mills.

(F) Nothing herein shall be construed as affecting any claims or rights of any citizens or residents of the State of Vermont that may exist against any party to No. 50, Original.

(G) The provisions of this Agreement shall apply to the New Mill as long as it exists, regardless of who owns or operates the New Mill.

(H) This Agreement does not resolve certain issues or claims raised by the pleadings in No. 50, Original. This is so in part because such issues or claims are likely to be dealt with by action of regulatory or executive agencies of the United States or the State of New York in the performance of their official duties. This Agreement shall not be construed as determinative of any such unresolved issues or claims. Claims disposed of in Appendix A annexed hereto and those covered by Article III(A)(2) of this Agreement shall be regarded as resolved by this Agreement.

(I) If any provision of Article V or Schedule 1 of this Agreement is held by any court to be invalid or unenforceable, the validity and the enforceability of the remaining provisions of Article V, Schedule 1 and the rest of this Agreement shall not be affected thereby, and the rights and obligations of the parties shall be construed and enforced as if this Agreement did not contain the particular provision or provisions held to be invalid or unenforceable.

(J) The parties may waive any of the provisions of this Agreement by joint written agreement.

V. *Resolution of Issues Which May Arise Under this Agreement*

(A) The parties recognize that certain issues may arise during the existence of this Agreement concern-

ing the construction, enforcement, modification (including, but not limited to, relief from), or termination of any of the provisions of this Agreement. In order to expedite the resolution of any such issues, the parties agree to submit these issues to binding arbitration, in the manner and form set forth in Schedule 1 of this Agreement. The parties further agree that all applications for: construction of any provision; enforcement of any obligation; modification of any provision; or termination of any provision of this Agreement shall be made only in accordance with Schedule 1 of this Agreement.

(B) Except as otherwise expressly set forth in Schedule 1, any application by any party for modification or termination of any provision of this Agreement may be granted only upon a clear showing that it is supported by: (a) conditions substantially changed from those existing on the date of entry of an order dismissing the amended complaint in No. 50, Original, or (b) conditions not reasonably detectable on that date, or (c) strong equitable considerations arising thereafter.

SCHEDULE 1

THE SOUTH LAKE REFEREE AND THE APPEAL BOARD

SECTION 1.1

(a) Within 90 days after the entry of an order dismissing the amended complaint in No. 50, Original, the parties shall confer and endeavor to agree upon a person to serve as South Lake Referee. The South Lake Referee shall be a lawyer. If agreement cannot be reached within that time, application may be made by any party to the President of the American Arbitration Association for the appointment of the South Lake Referee pursuant to the Rules of the Association.

(b) The South Lake Referee shall serve a term of three years, and, upon the consent of the parties, may serve one or more additional terms of three years. If the South Lake Referee declines to serve an additional term, or if any party withholds its consent to his reappointment as South Lake Referee, the parties promptly shall confer and endeavor to agree upon another individual to serve as South Lake Referee. If an agreement cannot be reached within 45 days from the date the South Lake Referee declines to serve another term, or from the date that consent to his reappointment as South Lake Referee is withheld by either party, the successor shall be designated by a majority vote of the Appeal Board. If the Appeal Board cannot agree upon the successor within 45 days from the time the matter is referred to it, the Chairman of the Appeal Board shall designate the succcessor.

(c) In the event that the South Lake Referee dies, resigns, or is otherwise unable to perform his duties as South Lake Referee, the parties promptly shall confer and endeavor to agree upon a successor. If agreement cannot be reached within 45 days from the date that both parties receive notice of the death, resignation or disability of the South Lake Referee, the successor shall be designated by a majority vote of the Appeal Board. If the Appeal Board cannot agree upon the successor within 45 days from the date the matter is referred to it, the Chairman of the Appeal Board shall designate the successor.

(d) Subject to the provisions of Section 1.2(b) of this Schedule, the South Lake Referee, in performing his duties pursuant to this Agreement, shall have the same power and authority as an arbitrator acting pursuant to federal law, or if that is inapplicable, New York law, and also the authority to take such other actions as are set forth in this Schedule. Unless waived by the parties, final decisions of

the South Lake Referee shall be based upon written findings of fact and, if appropriate, conclusions of law. Such decisions, if appealed, shall be reviewable by the Appeal Board according to the standard set forth in Section 1.2(b) below.

SECTION 1.2

(a) The Appeal Board shall consist of three independent persons, one of whom shall be designated by the State of Vermont and one by the Company. Each member of the Appeal Board shall be a lawyer. Such designations shall be made within 90 days from the entry of an order dismissing the amended complaint in No. 50, Original. Each party shall at all time be entitled to have one designee on the Appeal Board. In the event, however, that one party fails to designate a member of the Appeal Board and a matter is referred to the Appeal Board, the Chairman and the other member of the Appeal Board shall designate a person to serve as the second member. The third member and Chairman of the Appeal Board, who shall be its presiding officer, shall be the Honorable R. Ammi Cutter, heretofore the Special Master in No. 50, Original. The term of the Chairman shall be three years. At the end of any three-year term, if the parties consent and the Chairman is willing, he shall be reappointed for an additional term of three years. In the event that the Chairman dies, resigns, is not reappointed, or is otherwise unable to perform his duties, the parties shall confer promptly and endeavor to agree upon a successor Chairman. If an agreement cannot be reached within 45 days from the date that both parties receive notice of the death, resignation or disability of the Chairman, the successor Chairman shall be designated by the remaining members of the Appeal Board. If the remaining members of the Appeal Board cannot agree upon

the successor Chairman within 45 days from the time the matter is referred to them, the successor Chairman shall be designated, upon application by either party, by the President of the American Arbitration Association pursuant to the Rules of the Association.

(b) The Appeal Board shall hear and determine appeals from decisions of the South Lake Referee with respect to applications made to him by any party to this Agreement pursuant to Article V and Schedule 1 of this Agreement. The Appeal Board shall affirm any decision made by the South Lake Referee if such decision is supported by substantial evidence viewed on the record as a whole.

(c) A decision of the Appeal Board shall be made by a majority of its members, or by the unanimous vote of the Board. Such a decision shall be considered an award of arbitration and shall be given the same weight and effect as an arbitration award pursuant to federal law, or if that is inapplicable, New York law. The award of arbitration may be confirmed, and a judgment entered upon the confirmation, in any court of competent jurisdiction.

SECTION 1.3

(a) If any party desires to raise a matter pursuant to the provisions of Article V of this Agreement, the parties shall confer promptly among themselves and, if appropriate, with regulatory officials or boards, or other persons, in an effort to resolve the matter.

(b) In the event that the parties are unable to resolve by conference any matter under this Agreement that is also subject to the lawful jurisdiction of the United States Environmental Protection Agency or the New York State Department of Environmental Conservation, or both, the party seeking relief shall, upon notice to the other party,

make application to, and exhaust its administrative remedies (excluding appellate review) before, such regulatory agency or agencies in accordance with the requirements of applicable law and regulations. The party seeking relief, upon notice to the other party, may make application to the South Lake Referee for a waiver of the obligations set forth in this subparagraph and the South Lake Referee may grant the application upon a showing that the performance of those obligations is not necessary and appropriate.

(c) In the event that the parties are unable to resolve any such matter after exhaustion of the procedures set forth in subparagraphs (a) and (b) of this Section, within 30 days thereafter any party may make written application to the South Lake Referee pursuant to Article V for the purpose of resolving the matter. The application shall be served by certified mail upon the other party and shall set forth the nature of the matter, the specific action requested, and the reasons alleged why the application should be granted. Upon receipt of the application, the party in opposition to the application shall serve responding papers within 30 days. Thereafter, the South Lake Referee may require a conference between the parties, or, if he deems it necessary, a hearing on the matter. Such conference or hearing may be held at any reasonable time and place specified by the South Lake Referee.

SECTION 1.4

In any hearing held pursuant to Section 1.3(c) of this Schedule, any party may introduce testimony or exhibits, subject to evidentiary rulings by the South Lake Referee. All witnesses shall be sworn and subject to cross-examination. At the request of any party, a transcript shall be made of the hearing. The parties shall have the right to submit, and the South Lake Referee may require the submission of, briefs or memoranda.

SECTION 1.5

Subject to review by the Appeal Board, the South Lake Referee may take the following types of actions:

(a) He may grant, for good cause shown, reasonable temporary exemptions from, and reasonable extensions of time (not exceeding six months on any one application) for, the performance of any act or the compliance with any standard required by this Agreement. In granting any such exemptions or extensions, he may impose appropriate terms and conditions. In acting under this subparagraph, he shall take into account (among other relevant matters) whether there has existed or occurred:

(1) timely receipt by the applicant of all federal, state, and local permits required for all actions necessary to comply with this Agreement;

(2) reasonable availability from others of the services, materials, equipment, or supplies required for the construction, modification, or operation of facilities necessary to comply with this Agreement;

(3) the passage of a reasonable period of time required for the construction, modification, and operation of such facilities; or

(4) any event, such as an act of God, war, strike, flood, riot, catastrophe, or any other similar event beyond the control of the applicant which has affected the ability of the applicant to comply with this Agreement.

(b) Notwithstanding compliance by the Company with the provisions of Schedule 3 of this Agreement, if, after November 1, 1975, objectionable odors attributable to the New Mill are detected in the State of Vermont during a significant period of time, he may order other or further action or relief.

(c) If there is, after the date of this Agreement, a change in the Consent Order relating to New Mill air emissions executed by the Company and the New York State Department of Environmental Conservation or in any NPDES permit issued to the Company with respect to the New Mill, he may order modification of this Agreement as appropriate in light of the change in the Consent Order or the permit, pursuant to the standards set forth in Article V(B) of this Agreement.

(d) He may order modification or termination of any provision of this Agreement pursuant to the standards set forth in Article V(B) of this Agreement.

(e) He may construe or interpret any provision of this Agreement upon a showing by any party that such provision is ambiguous or reasonably susceptible of conflicting interpretations.

(f) If it is alleged in an application to the South Lake Referee that there has been a breach of any provision of this Agreement, he may render a decision on the application, including the ordering of relief, equitable or legal.

SECTION 1.6

In addition to the State of Vermont's rights under Article II(G)(1) of this Agreement, the State of Vermont may apply to the South Lake Referee for an order permitting its official representatives to inspect the Old Mill or the New Mill, and the South Lake Referee may direct the Company to permit inspection of the Old Mill or the New Mill, with or without notice to the Company, if, after hearing, reasonable notice of which has been given to the Company, the South Lake Referee determines that good cause has been shown for such an inspection.

SECTION 1.7

As promptly as practicable after the conclusion of any hearing and the submission of briefs and memoranda, the South Lake Referee shall inform the parties in writing of his decision. Unless any party appeals a decision of the South Lake Referee to the Appeal Board within 30 days after receipt of such decision, it shall be considered an award of arbitration and shall be given the same weight and effect as a decision of the Appeal Board pursuant to Section 1.2(c) of this Schedule.

SECTION 1.8

In connection with any appeal from a decision of the South Lake Referee, the parties shall have the right to submit briefs and memoranda. The Appeal Board may require the parties to submit briefs and memoranda, and, if appropriate, to present oral argument. Thereafter, by written decision the Appeal Board may affirm, modify, or reverse the decision of the South Lake Referee, or remand the matter to the South Lake Referee for such action as the Appeal Board directs.

SECTION 1.9

The parties shall pay, in equal shares, the fees and expenses to which the South Lake Referee may be entitled unless for just cause the Appeal Board or the South Lake Referee shall direct that payment thereof be borne in different proportions. In the event that the parties cannot agree on the amount of such fees and expenses, they will be set by the Appeal Board. The fees and expenses of the Appeal Board shall be set by the parties. In the event that the parties cannot agree on the amount of such fees or expenses, they will be fixed by the President of the American Arbitration Association pursuant to the Rules of the Association.

SECTION 1.10

Unless otherwise specifically provided, all questions of choice of law relative to controversies under this Agreement shall be within the sound discretion of the South Lake Referee and the Appeal Board.

SCHEDULE 2

The Bark Pile

The Company shall take the following measures by September 1, 1975 to reduce discharges into Ticonderoga Creek from or through the bark pile in the Village of Ticonderoga, New York:

(a) Appropriate grading and covering of the bark pile for the purpose of reducing, to the maximum extent feasible, seepage from the bark pile into Ticonderoga Creek or any watercourse flowing into Ticonderoga Creek; and

(b) The lowering of the water level in the pond adjacent to the bark pile for the purpose of reducing, to the maximum extent feasible, drainage from the pond through the bark pile to Ticonderoga Creek or any watercourse flowing into Ticonderoga Creek.

SCHEDULE 3

New Mill Air Emissions

SECTION 3.1

The Company shall endeavor in good faith to minimize malodorous air emissions from the New Mill.

SECTION 3.2

The Company by November 1, 1975 shall treat by thermal oxidation:

(a) the miscellaneous total reduced sulfur (hereinafter TRS) gases currently vented through the smelt tank scrubber;

(b) the gases from the condensate air stripper;

(c) the non-condensible gases currently burned in the lime kiln;

(d) the TRS gases from the seal tank (under) vents of the brown stock washers; and

(e) the TRS gases from the brown stock washers' exhaust system, including the hood vents.

SECTION 3.3

In the event that neither the power boiler nor the recovery boiler is used as the primary means for thermal oxidation of the non-condensible gases referred to in Section 3.2(c) of this Schedule, the Company shall maintain and operate the lime kiln, and appropriate equipment and fixtures, for thermal oxidation of the non-condensible gases in the lime kiln when the primary means of oxidation of the non-condensible gases is inoperative.

SECTION 3.4

Upon the entry of an order dismissing the amended complaint in No. 50, Original, the Company shall operate the recovery boiler in such a manner that the TRS emissions from that source shall not exceed:

(a) 5 ppm (parts per million) or 2.8 pounds per hour, whichever is more restrictive, as a daily arithmetic average; and

(b) 10 ppm or 5.6 pounds per hour, whichever is more restrictive, for more than 60 cumulative minutes per day.

The standards of performance referred to in this Section shall not be applicable during a period of 24 hours immediately before shutdown or during a period of 24 hours immediately following the commencement of startup operations of the recovery boiler.

SECTION 3.5

Commencing 90 days after the entry of an order dismissing the amended complaint in No. 50, Original, the Company shall:

(a) operate the lime kiln in such a manner that the TRS emissions from that source shall not exceed 10 ppm or 0.7 pounds per hour, whichever is more restrictive; provided, however, that this standard of performance shall not be applicable during a period of 24 hours immediately following the commencement of startup operations of the lime kiln;

(b) before any commencement of startup operations of the lime kiln and during any 24-hour startup period, maintain a sufficient amount of caustic (sodium hydroxide) in the scrubbing solution in the lime kiln scrubber for optimum removal of TRS; and

(c) when such caustic is used, continuously monitor and record the rate of flow of the caustic solution of known concentration, and periodically (at least once a shift) measure and record the pH of the scrubbing solution.

SECTION 3.6

The Company shall monitor continuously, in a reasonably accurate and reliable manner, the TRS emissions from the recovery boiler and the lime kiln and shall record continuously the results for each such source on a reasonably accurate and reliable automatic recording device.

SECTION 3.7

Emissions in excess of the limitations set forth in Section 3.4 or 3.5 of this Schedule shall not constitute a failure to comply with this Agreement in the absence of a finding by the South Lake Referee that objectionable odors attributable to the New Mill have been detected in the State of Vermont during a significant period of time.

SECTION 3.8

The parties shall not oppose the incorporation of Sections 3.2, 3.4 and 3.5 of this Schedule in the Consent Order in the proceeding now pending before the New York State Department of Environmental Conservation against the Company pursuant to Article 19 of the New York State Environmental Conservation Law.

SCHEDULE 4

New Mill Water Discharge

SECTION 4.1

The parties shall not oppose the incorporation of the following effluent limitations in the first NPDES permit to be issued to the Company with respect to the New Mill pursuant to Section 402 of the Federal Water Pollution Control Act:

(a) The amount of BOD_5 in the process waste water effluent shall not exceed 4,400 pounds per day as a monthly average; and

(b) The amount of total phosphorus (as P) in the process waste water effluent shall not exceed a concentration of 0.5 mg/1 as a monthly average or 88 pounds per day as a monthly average, whichever is more restrictive.

Until such time as the Company can demonstrate that it has installed an effluent flow-measuring system that can reliably measure the process waste water effluent on a continuous basis, the flow to be used in computing the loadings in number of pounds per day shall be the measured intake of water to the New Mill.

SECTION 4.2

The Company shall test the process waste water effluent twice a year during 1975 and 1976 to determine whether it is toxic to fish. To the extent feasible, one test per year shall be conducted during normal operations when black liquor is present in the process waste water effluent as a result of its being released from the spill pond to the waste treatment system and one test per year shall be conducted during normal operations when no black liquor is present in the process waste water effluent. The effluent shall be considered to be toxic if, over a 96-hour period, 20 per cent of the test fish fail to survive in a solution composed of 65 per cent process waste water effluent and 35 per cent water taken from Lake Champlain. The test fish to be used shall be yellow perch no greater than four inches in length taken from Lake Champlain at a point or points more than five miles distant from the point of discharge of the process waste water effluent. The procedures used and the results of these tests shall be reported in writing to the State of Vermont within 60 days after the tests have been completed.

SECTION 4.3

During the period from May 1 to November 30 of each calendar year, the Company shall:

(a) minimize, to the extent practicable, discharges of any type of black liquor through the waste water treatment system; and

(b) not discharge the contents of its spill pond through the waste water treatment system; provided, however, that it may discharge up to 15,000 pounds of BOD_5 per day from the spill pond for the purpose of maintaining the treatment system when the pulp and paper manufacturing processes are not in operation. An analysis for BOD_5 in the spill pond shall be conducted prior to discharge pursuant to the provisions of this paragraph.

SECTION 4.4

The parties shall not oppose the incorporation of the following requirements in the first NPDES permit to be issued to the Company with respect to the New Mill pursuant to Section 402 of the Federal Water Pollution Control Act:

(a) the Company shall sample and test its process waste water effluent as follows: color—daily; BOD_5 and total phosphorus (as P)—three days per week, none of which shall be consecutive to each other; settleable solids and suspended solids—five days per week; flow, temperature, and pH—continuous;

(b) the test for BOD_5 shall be performed on a twenty-four hour composite sample that has been refrigerated during collection and prior to analysis, and the analysis shall begin no more than two hours after collection of the composite;

(c) the test for total phosphorus (as P) shall be performed on the same sample as that referred to in paragraph (b) of this Section within 24 hours after collection of the composite, and such sample shall be preserved within two hours of collection; and

(d) the suspended solids shall be determined on the composite referred to in paragraph (b) of this Section, or on a minimum of four grab samples collected at four separate times at not less than four-hour intervals over a 16-hour period, at the option of the Company; provided, however, that:

(e) the requirements specified in paragraphs (a), (b), (c), and (d) of this Section shall not be applicable during shutdowns or total closures of the New Mill.

SECTION 4.5

All process waste water effluent samples to be tested for total phosphorus (as P) shall be collected and stored until analysis in Pyrex glass containers that have been pre-washed in a ten per cent (10%) solution of warm hydrochloric acid and subsequently rinsed three times with distilled water.

SECTION 4.6

(a) The effluent limitations and requirements set forth in Sections 4.1 and 4.4 of this Schedule, except for total phosphorus (as P), shall be in force as a result of this Agreement, effective upon the entry of an order dismissing the amended complaint in No. 50, Original, even if such limitations and requirements are not incorporated in the NPDES permit.

(b) The limitation for total phosphorus (as P) set forth in Section 4.1(b) of this Schedule shall become effective and in force as a result of this Agreement on July 1, 1977, even if such limitation is not incorporated in the NPDES permit.

IN WITNESS WHEREOF, the parties, through their authorized agents, have executed this Agreement this 23rd day of September, 1974.

STATE OF VERMONT

Witnesses:

(Illegible)

/s/ KIMBERLY B. CHENEY

.....

Kimberly B. Cheney
Attorney General of
Vermont

.....

INTERNATIONAL PAPER
COMPANY

.....

(Illegible)

/s/ A.P. FOSTER

.....

A. P. Foster
Vice-President,
Engineering and
Environmental
Management

[Jurat omitted in printing]

APPENDIX A

This document is delivered pursuant to Article III(A)(1) of an "Agreement of Settlement" between the State of Vermont and International Paper Company and Atricle IV(A)(1) of an "Agreement of Settlement" between the State of Vermont, International Paper Company, the State of New York, and the United States, both dated September 23, 1974, which Agreements constitute the basis for the settlement of *State of Vermont* v. *State of New York, et al.*, No. 50, Original. The provisions of Articles III(A) and IV(A) of those respective Agreements are incorporated herein by reference.

1. THE STATE OF VERMONT, a sovereign state, and all of its officers, agents, employees, and representatives, for and in consideration of the execution of two Agreements referred to above and the agreement of International Paper Company (hereinafter referred to as "the Company") to comply with the provisions of such Agreements, does hereby covenant not to sue, or bring or assert any claims, actions, or demands whatsoever against, the Company (as defined in paragraph 5 below) for or with respect to any matters which were or might have been alleged by the State of Vermont, or encompassed within the original or amended complaint, in *State of Vermont* v. *State of New York, et al.*, United States Supreme Court, No. 50, Original, relating to (a) alleged past, present and future harm caused by or arising from the accumulation of sediment in Ticonderoga Creek and the Ticonderoga Bay area of Lake Champlain, (b) alleged past, present and future harm caused by or arising from discharges to the water from the Company's Old Mill (located in the Village of Ticonderoga, New York) prior to the entry of an order dismissing the amended complaint in No. 50, Original, (c) alleged past, present and

future harm caused by or arising from emissions to the air from the Company's Old Mill prior to the entry of an order dismissing the amended complaint in No. 50, original and (d) alleged harm caused by or arising from emissions to the air from the Company's New Mill (located approximately four miles north of the Village of Ticonderoga, New York) prior to the entry of an order dismissing the amended complaint in No. 50, Original.

2. This document shall inure only to the benefit of the Company. It shall not inure to the benefit of the State of New York or any other person, government or entity (including, but not limited to, any alleged joint tortfeasor) who may be liable, primarily or secondarily or otherwise, at law or in equity, with respect to the alleged harm dealt with in subparagraphs (a)-(d) of paragraph 1 of this document, or the abatement thereof.

3. The State of Vermont expressly reserves all rights, claims, actions, suits, demands and causes of action that it has or may have against any person, government or entity other than the Company to recover damages for all harm, if any, arising after the date of entry of an order dismissing the amended complaint in No. 50, Original, and to obtain any legal, equitable or other relief to which it hereafter may be entitled and which is related to or arises out of the matters dealt with in paragraph 1 of this document.

4. It is understood and agreed by the parties hereto, and it is their intention, that this document shall be construed as, and shall have the effect of: (a) a covenant not to sue at common law, and (b) not barring, disminishing or in any way affecting any legal or equitable rights or claims, actions, suits, causes of action or demands whatsoever that the State of Vermont may have against anyone other than the Company, except as the same are precluded by Article

III(A)(2) and Article IV(A)(2), respectively, of the two Agreements referred to above.

5. The Company shall be defined as in Article I(A) of the two Agreements referred to above and, for the purposes only of this document and Articles III(A) and IV(A), respecively, of those two Agreements, shall be further defined to include any and all of the Company's past, present, and future directors, officers, employees, and corporate affiliates (including any and all past, present, and future directors, officers, and employees of such affiliates).

6. It is understood and agreed that this document contains the entire agreement with respect to the matters referred to herein, and there are no representations of warranties with respect to such matters except as expressly stated herein.

IN WITNESS WHEREOF, I, Kimberly B. Cheney, acting with lawful authority for and on behalf of the State of Vermont, have executed this document and affixed the Seal of the State of Vermont this day of , 1974.

STATE OF VERMONT

KIMBERLY B. CHENEY

.....

Attorney General of Vermont

[SEAL]

AGREEMENT OF SETTLEMENT BETWEEN THE STATE OF VERMONT, THE STATE OF NEW YORK, INTERNATIONAL PAPER COMPANY, AND THE UNITED STATES OF AMERICA

TABLE OF CONTENTS

AGREEMENT OF SETTLEMENT BETWEEN
THE STATE OF VERMONT,
THE STATE OF NEW YORK,
INTERNATIONAL PAPER COMPANY,
AND THE
UNITED STATES OF AMERICA

AGREEMENT, made this 23rd day of September, 1974 between the State of Vermont, the State of New York, the United States of America, and International Paper Company;

WHEREAS, by *per curiam* Opinion, dated June 3, 1974, the Supreme Court of the United States declined to approve a proposed consent decree signed on April 24, 1974 by counsel for each of the parties (including the intervenor) in *Vermont* v. *New York et al.*, No. 50, Original, for reasons more fully stated in the Opinion;

WHEREAS, the Court in Part II of that Opinion stated:

"A settlement of this interstate dispute by agreement of the parties is another alternative. Once a concensus is reached there is no reason, absent a conflict with an interstate compact, why such a settlement would not be binding. And such a settlement might be the basis for a motion to dismiss the complaint. Cf. 32 Orig., *Missouri* v. *Nebraska*, decided May 28, 1974, — U.S. —."

WHEREAS, all parties to No. 50, Original desire to settle that action in the manner suggested in the above-quoted language of the Court's Opinion and to file a Motion to

Dismiss without prejudice the amended complaint in No. 50, Original on the basis of the settlement set forth, in part, in this Agreement;

WHEREAS, the State of Vermont and International Paper Company have, contemporaneously with the execution of this Agreement by the State of Vermont, State of New York, United States of America, and International Paper Company, executed a separate agreement (hereinafter referred to as the "two-party agreement") upon which the Motion to Dismiss will also be based;

WHEREAS, this Agreement is, and shall be construed to be, a convenient arrangement for cooperation among the parties concerning the issues presented in No. 50, Original, (a) without affecting or limiting the power of the Congress of the United States to enact legislation concerning matters within lawful Federal jurisdiction; (b) without increasing in any way the political influence or powers of either of the two contracting states; (c) without encroaching on or impairing the supremacy of the United States in matters within its constitutional jurisdiction, or interfering with the rightful management of particular subjects placed under the entire control of the United States (see *Virginia* v. *Tennessee*, 148 U.S. 503, 517-519);

WHEREAS, this Agreement preserves and shall be construed as preserving the power and authority of each Federal or State regulatory body or agency having jurisdiction in the premises with respect to the future waste water discharges and air emissions from the Old Mill and the New Mill, as hereinafter defined; and

WHEREAS, there is no conflict between (a) this Agreement (and the two-party agreement) and (b) any interstate compact, including the New England Water Pollution Control Compact (61 Stat. 682);

NOW, THEREFORE, the State of Vermont, State of New York, United States of America, and International Paper Company (hereinafter collectively referred to as the "parties" to this Agreement) hereby stipulate and agree that this Agreement may be filed with the Clerk of the Supreme Court of the United States as the basis, in part, for a Motion to Dismiss the amended complaint in No. 50, Original or any other litigation, proceeding, or otherwise. amended complaint in No. 50, Original is not granted, this Agreement, the Appendices annexed hereto, and accompanying documents executed by any party in connection with this Agreement shall be of no effect whatsoever in No. 50, Original or any other litigation, proceeding, or otherwise, and the making of this Agreement, the Appendices annexed hereto, and accompanying documents shall not in any manner prejudice any consenting signatory in No. 50, Original or any other litigation, proceeding, or otherwise. This Agreement shall constitute a contract in settlement of No. 50, Original but shall not constitute an adjudication or finding on any issue of fact or law, or evidence or admission by any party with respect to any such issue raised therein. In consideration of the mutual rights and obligations herein set forth, the following provisions are agreed to and accepted by the parties and shall be binding upon them respectively.

I. DEFINITIONS. Whenever used or referred to in this Agreement, unless a different meaning appears clearly from the context:

(A) "The Company" means International Paper Company, a New York corporation, having its principal office at 220 East 42nd Street, New York, New York, and its successors and assigns, including any person, corporation, or other entity that succeeds to the business of International Paper Company;

(B) "Agreement" means this Agreement executed and consented to by the parties, and any amendments made from time to time, but does not include those documents annexed hereto and marked as Appendices;

(C) "Federal Water Pollution Control Act" means Public Law No. 92-500, 86 Stat. 816, as heretofore amended;

(D) "New Mill" means the land, buildings, equipment, and materials, including any additions or modifications thereto, at the manufacturing and waste treatment system sites owned and used by the Company and located approximately four miles north of the Village of Ticonderoga, New York;

(E) "Old Mill" means the land, buildings, equipment, and materials, including any additions or modifications thereto, located in the Village of Ticonderoga, New York owned and formerly operated as a kraft pulp and paper mill by the Company, but does not include the dam and certain contiguous property specified in Chapter 675 of the Laws of 1973 of the State of New York; and

(F) "South Lake Champlain" means that portion of Lake Champlain extending from Whitehall, New York to the Lake Champlain Bridge near Crown Point, New York.

II. THE COMPANY. The Company agrees to comply with all of the provisions of this Agreement relating to it, including the following:

(A) It shall take appropriate steps to inform its directors and responsible officers of the contents of this Agreement and the appendices annexed hereto; and

(B) It shall not oppose in the first National Pollutant Discharge Elimination System (hereinafter referred to as the "NPDES") permit to be issued to the Company with respect to the New Mill pursuant to Section 402 of the Federal Water Pollution Control Act, the inclusion of process waste water effluent limitations which confirm to those set forth in Section 4.1 of Schedule 4 of the two-party agreement.

III. THE STATE OF NEW YORK. The State of New York shall comply with all provisions of this Agreement relating to it, including the following:

(A) It shall:

(1) continue its program of studies of, and make recommendations with respect to, control of septic tank, sewer, agricultural, and other discharges to the South Lake Champlain basin;

(2) submit annually to each of the parties a written report of its activities undertaken pursuant to subparagraph (1) of this paragraph; and

(3) make available to each of the parties upon request, for inspection and copying, any such studies and recommendations, and any data or other information relating thereto.

(B) It shall:

(1) denominate, pursuant to the Federal Water Pollution Control Act, the Village of Ticonderoga, New York, as the municipality in the State of New

York having the highest priority in the allocation of federal funding for the development and construction of municipal waste treatment works; and

(2) abate the discharge of all raw sewage into South Lake Champlain pursuant to the applicable provisions of the Federal Water Pollution Control Act and the New York State Environmental Conservation Law.

(C) It shall give prority to the processing of, and promptly consider and respond to, any applications by the Company for permits to construct, modify, or operate pollution control facilities at the New Mill.

(D) It shall take such steps as are necessary to inform the appropriate members of the New York State Government (including, without limitation, the appropriate officials of the New York Department of Environmental Conservation) of the contents of this Agreement and the appendices annexed hereto.

(E) It shall not oppose in the first NPDES permit to be issued to the Company with respect to the New Mill pursuant to Section 402 of the Federal Water Pollution Control Act, the inclusion of process waste water effluent limitations which conform to those set forth in Section 4.1 of Schedule 4 of the two-party agreement; provided, however, that in the event that the State of New York succeeds to the administration of the NPDES prior to the issuance of such permit, this paragraph shall not be applicable with respect to the responsibilities of the State of New York as the permit-issuing agency.

(F) It shall give priority to the processing of, and promptly consider and resolve or adjudicate, any matter brought to its attention and for which application

has been made to its Department of Environmental Conservation or any successor agency relating to the abatement of air pollution or water pollution at the New Mill.

IV. THE STATE OF VERMONT. The State of Vermont shall comply with all provisions of this Agreement relating to it, including the following:

(A) (1) Within sixty days after the entry of an order dismissing the amended complaint in No. 50, Original, Vermont shall deliver to the Company a separate, executed copy of the document annexed hereto as Appendix A. The parties agree that Appendix A shall be construed and take effect as a covenant not to sue at common law in that:

(a) it shall prevent the State of Vermont from proceeding against the Company in any manner or respect specified in Appendix A, and (b) it shall not have the effect of barring, diminishing, or affecting in any way any legal or equitable rights or claims, actions, suits, causes of action, or demands that the State of Vermont may have against the State of New York or any person other than the Company, except as the enforcement of the same may be precluded by subparagraph (2) of this paragraph. The parties agree not to assert in any litigation or proceeding that Appendix A has any effect other than as stated in this subparagraph.

(2) Notwithstanding any provision of Appendix A or any reservation by the State of Vermont made therein, and notwithstanding the fact that No. 50, Original is to be dismissed without prejudice, the State of Vermont shall not seek to recover from any party to No. 50, Original damages for harm to the South Lake, its waters, shores, adjacent areas, and the atmosphere above and near it, allegedly suffered on or prior to the entry of an order dismissing the amended complaint in No. 50, Original, for which the State of Vermont could have sought recovery in No. 50, Original.

(B) It shall:

(1) submit to each of the parties by April 15 of each year, a written report describing the activities and studies relating to the natural environment of the South Lake Champlain basin that are contemplated to be undertaken by or for its Department of Water Resources during the following period of May 1-November 30;

(2) submit to each of the parties by February 15 of each following year, a written report describing all the activities and studies relating to the natural environment of the South Lake Champlain basin actually undertaken by or for its Department of Water Resources during the preceding period of May 1-November 30; and

(3) make available to each of the parties, upon request, for inspection and copying, any documents, not privileged, relating in whole or in part to the activities and studies referred to in subparagraphs (1) and (2) of this paragraph.

(C) It shall:

(1) study and recommend control of septic tank, sewer, agricultural, and other discharges within the Vermont portion of the South Lake Champlain basin;

(2) study and recommend the enactment of legislation or the promulgation of regulations concerning the use of detergents in Vermont;

(3) submit annually to each of the parties a written report describing its activities undertaken pursuant to subparagraphs (1) and (2) of this paragraph; and

(4) make available to each of the parties, upon request, for inspection and copying, any documents, not privileged, relating in whole or in part to its activities undertaken pursuant to subparagraphs (1) and (2) of this paragraph.

(D) It shall take such steps as are necessary to inform the appropriate members of the Vermont State Government (including, without limitation, the appropriate officials of the Vermont Agency of Environmental Conservation) of the contents of this Agreement and the appendices annexed hereto.

(E) It shall monitor on a regular basis and in a scientically acceptable manner, the water quality in that part of Lake Champlain from Chipman Point to the Lake Champlain Bridge near Crown Point, New York, and shall make the results of such monitoring available to the parties for inspection and copying upon reasonable request.

V. THE UNITED STATES OF AMERICA. The United States of America, by executing this Agreement: (1) recognizes the several bases, as set forth in paragraph (A) below, upon which the Company has entered into this Agreement and the two-party agreement and (2) agrees to comply with all the provisions of this Agreement relating to it, including the following:

(A) (1) The United States recognizes that the Company contends that the control technology required to comply with the effluent and emission limitations set forth in the two-party agreement goes beyond

the best practicable control technology currently available and the best available technology economically achievable;

(2) The United States further recognizes that the prosphorus limitation of 0.5 mg/1 set forth in Section 4.1 of Schedule 4 of the two-party agreement was agreed to by the Company by reason of the special characteristics of South Lake Champlain and recognizes that this phosphorus limitation was accepted by the Company in an effort to achieve settlement of a long, costly, and complicated court controversy; and

(3) The United States agrees that the inclusion of the limitations set forth in the two-party agreement shall not be used by it as a basis or justification for the United States Environmental Protection Agency effluent guidelines or emission regulations with respect to the bleached kraft pulp and paper industry. This in no way limits the United States from using technical information or studies related to pollution control at the New Mill in the future development of guidelines or standards for the regulation of effluents and emissions with respect to the bleached kraft pulp and paper industry. In establishing any such guidelines, the United States shall give appropriate consideration to: (a) the circumstances mentioned in subparagraph (2) of this paragraph, including the fact that such technical information or studies may exist only because special facilities will have been devised to meet the special problems of the receiving water here involved, and (b) any other available and relevant technical information or studies derived from the bleached kraft pulp and paper industry.

(B) The United States Environmental Protection Agency, upon entry of an order dismissing the amended complaint in No. 50, Original, shall deliver to the Company the signed original of a letter concerning the accumulation of sediment in Ticonderoga Creek and the Ticonderoga Bay area of Lake Champlain, a copy of which is annexed hereto as Appendix B.

(C) If, after five years from the entry of an order dismissing the amended complaint in No. 50, Original, the United States has not initiated action in any court seeking to impose liability upon the Company for environmental harm resulting from the accumulation of sediment in Ticonderoga Creek and the Ticonderoga Bay area of Lake Champlain because of past waste discharges, the United States shall then, in consideration of the signing and performance of this Agreement and also in consideration of the signing and performance of the two-party agreement, execute and deliver to the Company a copy of the document annexed hereto as Appendix C, which document forever bars the United States from seeking to impose liability upon the Company for such accumulation of sediment, except to the following extent: The United States shall not be precluded from seeking to establish at any time that the Company may be liable to meet any part of the costs arising out of remedial action taken as a consequence of the needs of anchorage or navigation. The document annexed hereto as Appendix C shall be construed as, and have the effect of, a covenant not to sue at common law.

(D) The United States Environmental Protection Agency shall give priority to, and promptly consider and take action regarding, the NPDES application

presently on file with that agency relating to process waste water effluent from the New Mill.

(E) The United States Environmental Protection Agency shall approve the denomination made by the State of New York, pursuant to subparagraph III (B)(1) of this Agreement, of the Village of Ticonderoga, New York, as the municipality in the State of New York having the highest priority in the allocation of federal funding for the development and construction of municipal waste treatment works.

(F) It shall take such steps as are necessary to inform the appropriate members of the United States Government (including, without limitation, the appropriate officials of the United States Environmental Protection Agency) of the contents of this Agreement and the appendices annexed hereto.

(G) It shall promptly consider, and resolve or adjudicate within a reasonable time, any matter brought to its attention and for which application has been made to its Environmental Protection Agency or any successor agency relating to the abatement of air pollution or water pollution at the New Mill.

VI. GENERAL PROVISIONS.

(A) Subject to the provisions of paragraph V (A) of this Agreement, the provisions of this Agreement are applicable and limited to the activities of the Company at the Old and New Mills and are not to be construed as applicable to, or in any way providing a precedent with respect to, any other mill, installation, facility, or location.

(B) Nothing herein (including, but not limited to, the emission and effluent limitations prescribed in the

two-party agreement) shall be construed to affect the authority, if any, of any regulatory or law enforcement authority with lawful jurisdiction:

(1) to regulate waste water discharges or air emissions from the Old Mill and the New Mill;

(2) to seek to abate the effects of such discharges or emissions; or

(3) to take such actions as are authorized by law to accomplish these ends (including, but not limited to, sampling at, or inspection of, the New Mill and the Old Mill).

(C) The provisions of this Agreement shall not be construed as, nor shall they operate as, an admission that the Company or the State of New York has or has not violated any law or regulation or otherwise committed a breach of duty at any time, and shall not constitute, in No. 50, Original or any other litigation or proceeding or otherwise evidence or any implication of any such violation or breach of duty.

(D) Any testimony taken or any exhibit received in evidence in No. 50, Original shall be received in evidence, if otherwise relevant and admissible, in any hearing or proceeding between or among the parties or any of them, and no party shall object to the introduction of such testimony or exhibit on the ground that the offering party has failed to produce the witness to testify with respect to such testimony or to authenticate such exhibit. The parties, however, reserve their rights, if any, to move to strike all or any portion of any testimony taken and all or any portion of any exhibit received in evidence in No. 50, Original.

(E) Any party may file this Agreement and the two-party agreement for recording in the appropriate

land records pertaining to the Old and New Mills, and the custodian of such land records is authorized to receive it for recording and, upon payment of any necessary fee, forthwith to record and index it appropriately under the name of the Company.

(F) Nothing herein shall be construed as affecting any claims or rights of any citizens or residents of the State of Vermont or the State of New York that may exist against any party to this Agreement.

(G) The provisions of this Agreement shall apply to the New Mill as long as it exists, regardless of who owns or operates the New Mill.

(H) This Agreement does not resolve certain issues or claims raised by the pleadings in No. 50, Original. This is so in part because such issues or claims are likely to be dealt with by action of regulatory or executive agencies of the United States or the State of New York in the performance of their official duties. This Agreement shall not be construed as determinative of any such unresolved issues or claims (including, among others, those arising in the future based upon the alleged accumulation of sediment in Ticonderoga Creek and the Ticonderoga Bay area of Lake Champlain). Claims disposed of in Appendix A and Appendix C annexed hereto and claims covered by subparagraph IV (A)(2) of this Agreement shall be regarded as resolved by this Agreement. Any issues or claims not resolved by this Agreement, or the two-party agreement, may be asserted in any forum having jurisdiction.

(I) It is understood and agreed by the parties that if any provision of this Agreement is by any court held to be invalid or unenforceable, as to all parties

or as to one or more parties hereto, the validity and enforceability of the remaining provisions of this Agreement and the two-party agreement, including, but not limited to, any provision dealing with the obligations between the State of Vermont and the State of New York, shall not be affected thereby, and the rights and obligations of the parties shall be construed and enforced as if this Agreement, as to all parties or as to one or more parties, as the case may be, did not contain the particular provision or provisions held to be invalid or unenforceable.

(J) The parties may waive any of the provisions of this Agreement by unanimous written agreement.

(K) If Vermont or the Company attempts to enforce any right, or seek relief from any obligation in this Agreement which also may be enforced or from which relief may be obtained under the provisions of the two-party agreement, enforcement or relief can be sought only pursuant to the terms and procedures of the two-party agreement.

IN WITNESS WHEREOF, the parties, through their authorized agents, have executed this Agreement this 23rd day of September, 1974.

Witnesses:

(Illegible)

(Illegible)

STATE OF VERMONT

/s/ Kimberly B. Cheney

Kimberly B. Cheney
Attorney General of
Vermont

(Illegible)

(Illegible)

STATE OF NEW YORK

Louis J. Lefkowitz

Louis J. Lefkowitz
Attorney General of
New York

(Illegible)

(Illegible)

INTERNATIONAL PAPER COMPANY

A. P. Foster

A. P. Foster
Vice-President,
Engineering and
Environmentl Management

(Illegible)

(Illegible)

UNITED STATES OF AMERICA

Robert H. Bork

Robert H. Bork
Solicitor General of the
United States

[Jurats omitted in printing]

APPENDIX A

This document is delivered pursuant to Article III(A)(1) of an "Agreement of Settlement" between the State of Vermont and International Paper Company and Article IV(A)(1) of an "Agreement of Settlement" between the State of Vermont, International Paper Company, the State of New York, and the United States, both dated September 23, 1974, which Agreements constitute the basis for the settlement of *State of Vermont* v. *State of New York, et al.*, No. 50, Original. The provisions of Articles III(A) and IV(A) of those respective Agreements are incorporated herein by reference.

1. THE STATE OF VERMONT, a sovereign state and all of its officers, agents, employees, and representatives, for and in consideration of the execution of two Agreements referred to above and the agreement of International Paper Company (hereinafter referred to as "the Company") to comply with the provisions of such Agreements, does hereby covenant not to sue, or bring or assert any claims, actions, or demands whatsoever against, the Company (as defined in paragraph 5 below) for or with respect to any matters which were or might have been alleged by the State of Vermont, or encompassed within the original or amended complaint, in *State of Vermont* v. *State of New York, et al.*, United States Supreme Court, No. 50, Original, relating to (a) alleged past, present and future harm caused by or arising from the accumulation of sediment in Ticonderoga Creek and the Ticonderoga Bay area of Lake Champlain, (b) alleged past, present and future harm caused by or arising from discharges to the water from the Company's Old Mill (located in the Village of Ticonderoga, New York) prior to the entry of an order dismissing the amended complaint in No. 50, Original, (c) alleged past, present and future harm caused by or arising from emissions to the air from the Company's Old Mill prior to the entry of an order dismissing the amended complaint in No. 50, Original and (d) alleged harm caused by or arising from emissions to the air from the Company's New Mill (located approximately four miles north of the Village of Ticonderoga, New York) prior to the entry of an order dismissing the amended complaint in No. 50, Original.

2. This document shall inure only to the benefit of the Company. It shall not inure to the benefit of the State of New York or any other person, government or entity (including, but not limited to, any alleged joint tortfeasor) who may be liable, primarily or secondarily or otherwise, at law or in equity, with respect to the alleged harm dealt with in subparagraphs (a)—(d) of paragraph 1 of this document, or the abatement thereof.

3. The State of Vermont expressly reserves all rights, claims, actions, suits, demands and causes of action that it has or may have against any person, government or entity other than the Company to recover damages for all harm, if any, arising after the date of entry of an order dismissing the amended complaint in No. 50, Original, and to obtain any legal, equitable or other relief to which it hereafter may be entitled and which is related to or arises out of the matters dealt with in paragraph 1 of this document.

4. It is understood and agreed by the parties hereto, and it is their intention, that this document shall be construed as, and shall have the effect of: (a) a covenant not to sue at common law, and (b) not barring, diminishing or in any way affecting any legal or equitable rights or claims, actions, suits, causes of action or demands whatsoever that the State of Vermont may have against anyone other than the Company, except as the same are precluded by Article

III(A)(2) and Article IV(A)(2), respectively, of the two Agreements referred to above.

5. The Company shall be defined as in Article I(A) of the two Agreements referred to above and, for the purposes only of this document and Articles III(A) and IV(A), respectively, of those two Agreements, shall be further defined to include any and all of the Company's past, present, and future directors, officers, employees, and corporate affiliates (including any and all past, present, and future directors, officers, and employees of such affiliates).

6. It is understood and agreed that this document contains the entire agreement with respect to the matters referred to herein, and there are no representations or warranties with respect to such matters except as expressly stated herein.

IN WITNESS WHEREOF, I, Kimberly B. Cheney, acting with lawful authority for and on behalf of the State of Vermont, have executed this document and affixed the Seal of the State of Vermont this day of , 1974.

STATE OF VERMONT

KIMBERLY B. CHENEY

.....

Attorney General of Vermont

[SEAL]

APPENDIX B

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

[Letterhead omitted]

Sept. 16, 1974

William L. Lurie, Esquire
Vice-President and General Counsel
International Paper Company
220 East 42nd Street
New York, New York 10017

Dear Mr. Lurie:

The position of the United States in *State of Vermont* v. *State of New York and International Paper Company*, Original No. 50, was stated in the Petition of Intervention of the United States of America filed in December 1972, namely, that removal of the sludge deposits in Ticonderoga Creek and the nearby waters of Lake Champlain at that time would not be in the public interest.

At the present time it is still the opinion of the Federal Government that water quality conditions and environmental factors do not justify dredging the sludge deposits in Ticonderoga Creek and the nearby waters of Lake Champlain. This conclusion is based upon the evaluation of data collected by all parties through the summer of 1973. It is apparent that since the 1970 Lake Champlain Enforcement Conference, the waters of Ticonderoga Creek and the nearby waters of Lake Champlain have improved appreciably in quality, *e.g.*, dissolved oxygen levels in the waters of Ticonderoga Creek and the nearby waters of Lake Champlain have been essentially meeting water quality

standards. The environmental effects of removal must be balanced against the observed water quality improvement.

The factors which may be contributing to such improved conditions are the cessation of discharges from the old IPC mill on Ticonderoga Creek, the high water levels in Lake Champlain during recent years, and measurable reduction in the effect of the sludge deposits upon overlying waters.

Although we are not able to predict, at this time, what the future of the sludge deposits will be, we are able to reaffirm our position thatt he quality of the aquatic environment on and around those deposits has improved and is continuing ot improve.

Sincerely yours,

/s/ ALAN G. KIRK, II
Alan G. Kirk, II
Assistant Administrator for
Enforcement and General Counsel
(EG-329)

cc.:
Mr. Keith Fry
Director, Corporate Air
& Water Management
International Paper Company

APPENDIX C

WHEREAS, the position of the United States in *State of Vermont* v. *State of New York and International Paper Company*, No. 50, Original, was stated in the Petition of Intervention of the United States filed in December 1972, namely, that removal of the accumulation of sediment in Ticonderoga Creek and the Ticonderoga Bay area of Lake Champlain at that time would not be in the public interest; and

WHEREAS, the United States entered into an "Agreement of Settlement" with the other parties to the aforementioned civil action on September 23, 1974; and

WHEREAS, the position of the United States Environmental Protection Agency was stated by it in a letter (attached to the aforementioned "Agreement of Settlement" as Appendix B) dated September 16, 1974, to International Paper Company, a corporation existing under the laws of the State of New York, located at New York, New York (hereinafter "the Company"); and

WHEREAS, in Article V(C) of the aforementioned "Agreement of Settlement" the United States agreed to execute and deliver to the Company a document forever barring the United States from seeking to impose liability upon the Company for environmental harm resulting from the accumulation of sediment in Ticonderoga Creek and the Ticonderoga Bay area of Lake Champlain because of past waste discharges (except for any part of the costs, for which the Company at any time may be established to be liable, arising out of remedial action taken as a consequence of the needs of anchorage or navigation) if the United States did not initiate action in any Court within five years from the entry of an order dismissing the amended complaint in

No. 50, Original, seeking to impose liability upon the Company for environmental harm resulting from such accumulation of sediment; and

WHEREAS, the United States has not initiated any such action against the Company within such time;

NOW, THEREFORE, in view of the foregoing and in consideration of the signing and performance of the aforementioned "Agreement of Settlement" between the parties to No. 50, Original and also in consideration of the signing and performance of a separate "Agreement of Settlement" between the Company and the State of Vermont dated September 23, 1974, the United States does hereby release and forever discharge the Company, and any and all of its past, present, and future directors, officers, employees, and corporate affiliates (including any and all past, present, and future directors, officers, and employees of such affiliates) from all liability for the accumulation of sediment in Ticonderoga Creek and the Ticonderoga Bay Area of Lake Champlain because of past waste discharges, except to the following extent:

The United States shall not be precluded from seeking to establish at any time that the Company may be liable to meet any part of the costs arising out of remedial action taken as a consequence of the needs of anchorage or navigation.

This document shall be construed as, and have the effect of, a covenant not to sue at common law.

This document contains the entire agreement between the United States and the Company with respect to the matters referred to herein and there are no representations or warranties with respect to such matters except as expressly stated herein.

This document shall enure to, and only to, the benefit of each of the corporations and persons referred to above and

their respective successors, assigns, heirs, executors, and administrators.

IN WITNESS WHEREOF, I, , acting with lawful authority for and on behalf of the United States, have executed this document and affixed the Seal of the Department of Justice of the United States of America this day of , 1979.

UNITED STATES OF AMERICA

By: .....
[Title]

United States Department of Justice
Washington, D.C.

[SEAL]

Exhibit B to Dolloff Affidavit

Permit No.: NY 0020036, NY 0004413

Name of Permittee:
International Paper Company

Effective Date: December 31, 1974

Expiration Date: December 31, 1979

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMIT

DISCHARGE PERMIT

In reference to the above application for a permit authorizing the discharge of pollutants in compliance with the provisions of the Federal Water Pollution Control Act, as amended by the Federal Water Pollution Control Act Amendments of 1972, P.L. 92-500, October 18, 1972 (33 U.S.C. § 1251-1376) (hereinafter referred to as "the Act"),

International Paper Company
220 East 42nd Street
New York, New York 10017

(hereinafter referred to as "the permittee")
is authorized by the Regional Administrator, Region II, U.S. Environmental Protection Agency
to discharge from its Ticonderoga Mill, located at

Ticonderoga, Essex County, New York
to Lake Champlain and Five Mile Creek
in accordance wtih the following conditions.

1. All discharges authorized herein shall be consistent with the terms and conditions of this permit; facility expansions, production increases or process modifications which result in new or increased discharges of pollutants must be reported by submission of a new NPDES application, or if such new or increased discharge does not violate

the effluent limitations specified in this permit, by submission to the Regional Administrator of notice of such new or increased discharges of pollutants; the discharge of any pollutant more frequently than or at a level in excess of that identified and authorized by this permit shall constitute a violation of the terms and conditions of this permit.

2. After notice and opportunity for a public hearing, this permit may be modified, suspended, or revoked in whole or in part during its term for cause including, but not limited to, the following:

a. Violation of any terms or conditions of this permit;

b. Obtaining this permit by misrepresentation or failure to disclose fully all relevant facts;

c. A change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge.

3. Notwithstanding Condition 2 above, if a toxic effluent standard or prohibition (including any schedule of compliance specified in such effluent standard or prohibition) is established under Section 307(a) of the Act for a toxic pollutant which is present in the discharge authorized herein and such standard or prohibition is more stringent than any limitation upon such pollutant in this permit, the Regional Administrator shall revise or modify this permit in accordance with the toxic effluent standard or prohibition and so notify the permittee.

4. The permittee shall allow the Regional Administrator or his authorized representative and/or the authorized representative of the State water pollution control agency, in the case of non-Federal facilities, upon the presentation of his credentials:

a. To enter upon the permittee's premises in which an effluent source is located or in which any records are required to be kept under the terms and conditions of this permit;

b. To have access to and copy at reasonable times any records required to be kept under the terms and conditions of this permit;

c. To inspect at reasonable times any monitoring equipment or monitoring method required by this permit;

d. To sample at reasonable times any discharge of pollutants.

5. The permittee shall at all times maintain in good working order and operate as efficiently as possible any facilities or systems of treatment or control installed or utilized by the permittee to achieve compliance with the terms and conditions of this permit.

6. The issuance of this permit does not convey any property rights either in real estate or material, or any exclusive privileges, nor does it authorize any injury to private property or any invasion of rights, nor any infringement of Federal, State or local laws or regulations; nor does it obviate the necessity of obtaining State or local assent required by law for the discharge authorized.

7. This permit does not authorize or approve the construction of any onshore or offshore physical structures or facilities or the undertaking of any work in any navigable waters.

8. The specific effluent limitations and other pollution controls applicable to the discharge permitted herein are set forth in the following conditions. The following conditions

also set forth self-monitoring and reporting requirements. Unless otherwise specified, the permittee shall submit duplicate original copies of all reports to the head of the State water pollution control agency and the Regional Administrator. Except for data determined to be confidential under Section 308 of the Act, all such reports shall be available for public inspection at the office of the Regional Administrator. Knowingly making any false statement on any such report may result in the imposition of criminal penalties as provided for in Section 309 of the Act.

9. *General Limitations.*

a. The permittee shall not discharge hazardous substances into or upon navigable waters or adjoining shorelines in quantities defined as harmful in regulations promulgated by the Administrator pursuant to Section 311(b)(4) of the Federal Water Pollution Control Act, as amended. Nothing in this permit shall be deemed to preclude the institution of any legal action nor relieve the permittee from any responsibilities, liabilities, or penalties to which the permittee is or may be subject under Section 311 of the Federal Water Pollution Control Act, as amended, or under any other Federal or State law or regulations.

b. Except as specifically authorized in this permit, the permittee shall not discharge floating solids or visible foam in other than trace amounts.

c. *Initial Effluent Limitations.* During the period beginning on December 31, 1974 and lasting until July 1, 1977, discharges shall be limited by the permittee as specified below:

Discharge Serial Number	Parameter	Discharge Limitation in kg/day (lbs/day) —Net Daily Average	Daily Maximum	Other Limitations Average	Maximum
001	Total Kjeldahl Nitrogen	2500 (5500)	4500 (9900)		
	Total Suspended Solids	14,515 (32000)	21772 (48000)		
	BOD_5	2000 (4400)	3600 (7920)		
	pH Range (units)				4.3-9.0
002 Sanitary Discharge	Total Suspended Solids	6(13)	12(26)		
	BOD_5	6(13)	12(26)		
	Fecal Coliform Bacteria MPA/ 100 (ml)			200*	400**
	pH Range (units)				6.0-9.0

d. *Initial Thermal Limitations*—Unless specified otherwise in Conditions 10(b) and 11, the following limitations apply on the effective date of this permit and last for the duration of the permit.

---

* The average is based upon a geometric mean of the values for effluent samples collected during a month.

** The maximum is based on the geometric mean of the values for effluent samples collected over a 7 consecutive day period.

The permittee shall discharge effluent(s) such that the following conditions are satisfied:

(1) Discharge Serial No.	Thermal Effluent Limits
001	a. The maximum discharge temperature shall not exceed 37.2°C(99°F) at any time.
	b. The effluent(s) shall be discharged in such a manner so as to provide that the water surface temperature shall not exceed 32.2°C(90°F) at any point.

10(a). *Required Effluent Discharge.* During the period beginning July 1, 1977 and lasting until the date of expiration of this permit, discharges shall comply with Condition 9(c) above and shall not exceed the values listed below for those parameters indicated:

Discharge Serial Number	Parameter	Discharge Limitation in kg/day (lbs/day) —Net Daily Average	Daily Maximum	Other Limitations Average	Maximum
001	Total Suspended Solids	3100 (6800)*	7440 (16,320)		
	Total Kjeldahl Nitrogen	635 (1400)	1143 (2520)		
	pH Range (Units)				6.5-8.5
	Total Phosphorous as P	40 (88)**	72 (158)		

---

* Note: Or a concentration of 37 mg/liter, whichever is more restrictive.

** Note: Or a concentration of 0.5 mg/liter, whichever is more restrictive.

Color	Discharge shall not increase the color of any Vermont waters above 25 standard color units and shall not increase the color of any Vermont waters which have a background color of more than 25 standard units.
Turbidity	Discharge shall not increase the turbidity of any Vermont waters above 25 J.T.U. and shall not increase the turbidity of any Vermont waters which have a background turbidity of more than 25 J.T.U.
Toxic Wastes	There shall be no discharge of wastes containing any of the following substances in detectable amounts to the waters of Vermont. If it is established by the permittee that its process water contains an incoming level of the following substances due to natural or other causes, the concentration in the actual waste discharge shall not be increased:

Mercury
Thallium
DDT:
Dichlorodiphenyl trichloroethane
2, 4, 5-T
2, 4, 5-trichlorophenoxyacetic acid

Aldrin:
hexachlorohexahydro-endo
exo-dimethanonaphalene

Dieldrin:
hexachloroepoxyoctahydro-endo
exodimethanonaphalene

Endrin:
hexachloroepoxyoctahydro-endo
endodimethanonaphalene

Diquat:
diquat dibromide
6, 7-dihydrodicipyrido (1-2-a; 2', 1'-c)
pyraxinediium dibromide

There shall be no other wastes either alone or in combination with other substances or wastes in sufficient amounts or at such temperatures as to be injurious to fish life, make the waters unsafe or unsuitable as a source of water supply for drinking, culinary or food processing purposes or impair the water for any best usage as determined for the specific waters which are assigned to this class.

Settleable solids; Sludge Deposits;	None which are readily visible and attributable to sewage, industrial wastes or other wastes or which deleteriously increase the amounts of these constituents in receiving waters after opportunity for reasonable dilution and mixture with the wastes discharged thereto.

The discharge shall be limited at all times so as to be in full compliance with all applicable requirements of Sections 701, 702 and 704 of Title 6, Official Compilation of Codes,

Rules and Regulations—Classifications and Standards Governing Quality and Purity of Waters of New York State.

002: Sanitary Wastewater Treatment Plan Effluent

Parameter	*Effluent Limitation*
pH(range)	6.5 to 8.5
Settleable solids; sludge deposits	None which are readily visible and attributable to sewage, industrial wastes or other wastes or which deleteriously increase the amounts of these constituents in receiving waters after opportunity for reasonable dilution and mixture with the wastes discharged thereto.
Toxic wastes, oil, deleterious substances, colored or other wastes or heated liquids	None alone or in combination with other substances or wastes in sufficient amounts or at such temperatures as to be injurious to fish life, make the waters unsafe or unsuitable for bathing or impair the waters for any other best usage as determined for the specific waters which are assigned to this class.
General	The discharge shall be limited at all times so as to be in full compliance with all applicable requirements of Sections 701, 702, and 704 of Title 6, Official Compilation of Codes, Rules and Regulations — Classifications and Standards Governing Quality and Purity of Waters of New York State.
Disinfection	No discharge which is not effectively disinfected.

10(b) *Thermal Limits*

(1) After July 1, 1977, the permittee shall discharge effluent(s) such that within the waters of the State of Vermont the following conditions* are satisfied:

The permittee is prohibited from discharging any effluent into Lake Champlain that will cause the temperature of any of the receiving waters in Vermont to rise more than 1°F. when that water is above 60°F.; that will cause the temperature of any of the receiving waters in Vermont to rise more than 2°F. when that water is from 50°F. to 60 F.; and that will cause the temperature of any of the receiving waters in Vermont to rise more than 3°F. when that water is less than 50°F. Furthermore, the permittee is prohibited from discharging any waste which causes, upward or downward, a temperature change in any Vermont waters of more than 0.5°F. per hour from May 1 through October 31, nor 1.0°F. from November 1 through April 30. Finally, the permittee is prohibited from withdrawing from or discharging process or cooling water to the hypolimnion of any Vermont waters.

11. *Schedule of Compliance.* The permittee shall comply with the following schedule and shall report to both the Regional Administrator and the State Agency within 14

---

* These Conditions have been imposed in order to protect the water quality of the waters of the State of Vermont. The area of applicability of these conditions can be modified by the future imposition of a thermal mixing zone by the authority of the State of Vermont subject to that State's statutes and regulations.

days following each date on the schedule detailing its compliance or noncompliance* with the schedule date and requirement:

(a) The permittee shall submit an engineering report to the State Agency covering any required additional treatment facilities by April 1, 1975;

(b) The permittee shall complete final plans and specifications for the treatment facilities and submit it to the State Agency in accordance with State requirements** by August 1, 1975;

(c) The permittee shall start construction of its facilities by October 1, 1975;

(d) The permittee shall report to the Regional Administrator and the State Agency on the progress of construction of its facilities by July 1, 1976;

(e) The permittee shall complete construction of the facilities by May 1, 1977;

---

* Each notice of noncompliance shall include the following information:

(1) A short description of the noncompliance;

(2) A description of any actions taken or proposed by the permittee to comply with the elapsed schedule requirement without further delay;

(3) A description of any factors which tend to explain or mitigate the noncompliance; and

(4) An estimate of the date permittee will comply with the elapsed schedule requirement and an assessment of the probability that permittee will meet the next schedule requirement on time.

** All reports, plans and/or specifications that propose new or modified waste treatment and/or disposal facilities must be approvable and signed, and sealed, by a professional engineer, licensed to practice in the State in which the facilities are to be built.

(f) The permittee shall attain the operational levels required to achieve the limits specified in Condition 10 by July 1, 1977.

12. *Monitoring and Recording.* The permittee shall monitor and record the quantitative values of each discharge according to the following schedule and other provisions: for each discharge and for each Sampling Schedule listed below, the flow (in gallons per day) shall be measured*. Where net values are listed in Condition 9(c) and/or 10 the surface water intake is to be sampled with the same frequency and type of sample as specified below for each required parameter.

Grab samples only shall be taken for analysis of temperature, settleable solids, oil and grease, pH and any bacteriological analysis. Care shall be exercised when collecting a composite sample such that the proper preservative is present in the sample container during sample collection. Depending on the analysis to be conducted, several different containers and preservation techniques may be required. Samples shall be analyzed as quickly as possible after collection and in no case shall the maximum holding time exceed that contained in the references cited in Condition 12(f).

See special notes regarding sampling procedures following the required sampling schedule.

---

* For all continuous discharges, flow shall be measured and recorded continuously; for intermittent discharges, the flow shall be measured and reported at a frequency coinciding with the most frequently sampled parameter. Methods, equipment, installation and procedures shall conform to those prescribed in the Water Measurement Manual, U.S. Department of the Interior Bureau of Reclamation, Washington, D.C., 1967.

(a) *Sampling Schedule*—Sampling shall commence on December 31, 1974.

Discharge Serial No.	*Parameter*	*Minimum Freq. of Analysis*	*Sample Type*
001	Color	Daily	Grab
	Settleable Solids	5 days/week	Grab
	Total Phosphorus	3 days/week***	Composite
	Nitrogen Series**	3 days/week***	Composite
	Total Suspended Solids	5 days/week	Composite
	BOD_5	3 days/week***	Composite
	BOD_{28}	1 day/week	Composite
	pH	Continuous	Continuous
002 Sanitary Discharge	BOD_5	Weekly	Composite
	Total Suspended Solids	Weekly	Composite
	pH	Weekly	Grab
	Fecal Coliform Bacteria	Weekly	Grab

Special Notes:

(1) The test for BOD_5 and BOD_{28} shall be performed on a 24-hour composite sample which has been refrigerated during collection and prior to analysis and the analysis shall begin no more than two hours after collection of the composite;

(2) The test for total phosphorus shall be performed on the same samples as (1) above within 24 hours after collection of the composite, and such sample shall be preserved within 2 hours of collection; and samples shall be collected and stored until analysis in Pyrex glass containers prewashed with warm 10% hydrochloric acid and rinsed 3 times with distilled water.

** Nitrogen Series: Total Kjeldahl Nitrogen, Ammonia, Nitrate, Nitrite.

*** These days shall not be consecutive to each other.

(3) The suspended solids shall be determined on the composite in (1) above or on a minimum of four grab samples collected at four separate times over a 16-hour period, at the option of the Company; and

(4) The above sampling shall not be required during scheduled shutdowns or total closures of the New Mill.

(b) *Thermal Sampling Schedule for Discharge 001* *

(1) Commencing on December 31, 1974 and lasting for the duration of the permit, discharge temperature shall be monitored continuously.

(2) Commencing on December 31, 1974 and lasting until July 1, 1977, the receiving water surface temperature shall be monitored monthly (July, August, and September only) at maximum heat discharge; the surface water temperature shall be measured at representative points (these points should correspond to the maximum surface temperatures) in the vicinity of discharge 001. The basis for choosing such points shall be included in the first submitted monitoring report for review by the Regional Administrator and State Certifying Agency. The sampling results shall be reported to the Regional Administrator and State Certifying Agency on the 28th of each month.

(3) Commencing on December 31, 1974 and lasting for the duration of the permit, surface isotherm plots for April through June and July through September at periods of maximum discharge of heat (the company shall indicate the heat content of the discharge in BTU/hour) down to the 1°F excess temperature (1°F above ambient

* Upon review of the monitoring data by the Regional Administrator and State Certifying Agency, further monitoring may be required.

receiving water temperature) shall be submitted to the Regional Administrator and State Certifying Agency on August 1 and November 1 of each year.

(c) *Modifications to Sampling Schedules*—The permittee may submit for approval an alternate schedule(s) to account for any realignment of discharges, for substitutions of parameters to be sampled, for analytical and sampling methods to be utilized, for elimination of intake sampling, for realignment of sampling locations so that concentrations to be measured are within reliable sensitivity ranges of the analytical techniques, and for the compositing by volume of individual discharge samples to make a single plant sample. With regard to substituting parameters such as TOC or COD for BOD, the permittee shall provide test data to support the correlation between the parameters. As for elimination of intake monitoring, the permittee shall provide sufficient data to establish the average levels of intake parameters and demonstrate that any variations in the intake characteristics would have minimum impact upon the permittee's discharge(s). In such cases, the alternate monitoring schedule shall provide for periodic verification of parameter correlations and intake parameter levels.

If the permittee monitors any pollutant more frequently than is required by this permit, he shall include the results of such monitoring in the calculation and reporting of the values required in the Discharge Monitoring Report Form (EPA Form 3320-1 (10-72)) in Condition 12(g). Such increased frequency shall be indicated on the Discharge Monitoring Report form.

(d) *Quality Control*—Adequate care shall be maintained in obtaining, recording, and reporting the required data on effluent quality and quantity, so that the precision and accuracy of the data will be equal to or better than that achieved by the prescribed standard analytical procedures.

The permittee shall calibrate and perform maintenance procedures on all monitoring and analytical instrumentation at sufficiently frequent intervals to ensure accuracy of measurements.

Sampling shall be representative of the volume and quality of effluent discharged over the sampling and reporting period.

The permittee is responsible for assuring that the methodology used is reliable for their specific wastes in their laboratory. The permittee must be able to demonstrate to the Regional Administrator that they have a viable quality control program.

(e) *Recording*—The permittee shall maintain and record the results of all required analyses and measurements and shall record, for all samples, the date and time of sampling, the sample method used, the dates analyses were performed, who performed the sampling and analyses, and the results of such analyses.

All records shall be retained for a minimum of 3 years, such a period to be extended during the course of any unresolved litigation or when so requested by the Regional Administrator. The permittee also shall retain all original stripchart recordings from any continuous monitoring instrumentation and any calibration and maintenance records for a minimum of 3 years, such period to be extended during the course of any unresolved litigation or when so requested by the Regional Administrator.

The permittee shall provide the above records and shall demonstrate the adequacy of the flow measuring and sampling methods upon request of the Regional Administrator. The permittee shall identify the effluent sampling point used for each discharge pipe by providing a sketch or flow diagram, as appropriate, showing the locations.

(f) *Sampling and Analysis*

All sampling and analytical methods used to meet the monitoring requirements specified above shall conform to guidelines establishing test procedures for the analysis of pollutants, published pursuant to Section 304(g) of the Federal Water Pollution Control Act, as amended. If the Section 304(g) guidelines do not specify test procedures for any pollutants required to be monitored by this permit and until such guidelines are promulgated, sampling and analytical methods used to meet the monitoring requirements specified in this permit shall, unless otherwise specified by the Regional Administrator, conform to the latest edition of the following references:

Standard Methods for the Examination of Water and Wastewaters, 13th Edition, 1971 American Public Health Association, New York, New York 10019.

A.S.T.M. Standards, Part 23, Water; Atmospheric Analysis, 1972, American Society for Testing and Materials, Philadelphia, Pennsylvania 19103.

W.Q.O. Methods for Chemical Analysis of Water and Wastes, April 1971, Environmental Protection Agency, Water Quality Office, Analytical Quality Control Laboratory, NERC, 1014 Broadway, Cincinnati, Ohio 45268.

(g) *Reporting*

The results of the above monitoring requirements shall be reported by the permittee in the units specified in Conditions 9(c) and 10. A report or a written statement shall be submitted even if no discharge occurred during the reporting period. A report shall also be submitted if there have been any modifications in the waste collection, treatment, and disposal facilities, changes in operations pro-

cedures, or other significant activities which alter the quality and quantity of the discharges or otherwise concern these Conditions. Permanent elimination of a discharge shall be promptly reported by the permittee in writing to the Regional Administrator.

The permittee shall include in this report any previously approved non-standard analytical methods used. Copies of the report shall be sent to both the Regional Administrator and the State Agency no later than the 28th day of the month following the completed reporting period.* A Discharge Monitoring Report from [EPA Form 3320-1 (10-72)] shall be used for reporting.

(h) *Other Requirements*

The permittee shall comply with all monitoring, recording, and reporting requirements of the State in which the discharge occurs.

The permittee shall transmit to the Regional Administrator a duplicate copy of any reports on radioactive liquid releases required to be submitted to the Atomic Energy Commission.

The permittee shall transmit to the Regional Administrator a duplicate copy of any reports on pesticides required to be submitted to the U.S. Department of Agriculture.

13. *Sludge Disposal.* Collected screenings, sludges, and other solids and precipitates separated from the permittee's discharges authorized by this permit and/or intake or supply water by the permittee shall be disposed of in such a manner as to prevent entry of such materials into navigable waters or their tributaries. Any live fish, shellfish, or other animals collected or trapped as a result of intake water

---

* *Note*: Results for BOD_{28} shall be included in the report for the subsequent reporting period.

screening or treatment may be returned to their water body habitat. The permittee shall report on all effluent screenings, sludges and other solids associated with the discharge herein described. The following data shall be reported together with the monitoring data required in Condition 12:

a. The sources of the materials to be disposed of;

b. The approximate volumes and weights;

c. The method by which they were removed and transported;

d. Their final disposal locations.

14. *Air Emissions.* Nothing contained in this permit shall be deemed to authorize any air emissions containing waste gases and/or particulate matter from existing or future waste treatment facilities associated with the discharge herein described in excess of the permissible levels specified in Federal and State Air Quality Standards.

15. *Storm Water.* Any accumulated storm waters from the plant grounds which have come into contact with raw materials, chemicals, oils, contaminants, impurities, or other materials normally not present in storm water runoff shall not be discharged into navigable waters or their tributaries without prior treatment and reqiured authorization.

16. *Discharge Containing Parameter Not Previously Reported.* The permittee shall not discharge any wastewater containing a substance or characterized by a parameter which was indicated as absent in its NPDES Permit Application. In the event of such a discharge, the permittee shall notify the Regional Administrator and the State Agency prior to the discharge.

17. *Non-Compliance with Conditions.* In the event the permittee is unable to comply with any of these conditions, due, among other reasons, to:

(1) Breakdown of waste treatment equipment, (biological and physical-chemical systems including, but not limited to, all pipes, transfer pumps, compressors, collection ponds or tanks for the segregation of treated or untreated wastes, ion exchange columns, or carbon absorption units);

(2) Accidents caused by human error or negligence; or

(3) Other causes, such as acts of nature,

the permittee shall notify the Regional Administrator and the State Agency immediately by telephone and in writing within five days. The written notification shall include the following pertinent information:

(1) Cause of noncompliance;

(2) A description of the noncomplying discharge including its impact upon the receiving waters;

(3) Anticipated time the condition of noncompliance is expected to continue, or if such condition has been corrected, the duration of the period of noncompliance;

(4) Steps taken by the permittee to reduce and eliminate the noncomplying discharge; and

(5) Steps to be taken by the permittee to prevent recurrence of the condition of noncompliance.

Permittee shall take all reasonable steps to minimize any adverse impact to navigable waters resulting from noncompliance with any effluent limitation specified in this permit, including such accelerated or additional monitoring as necessary to determine the nature and impact of the noncomplying discharge.

Nothing in this permit shall be construed to relieve the permittee from appropriate civil or criminal penalties for noncompliance.

Until July 1, 1977 anything in this permit to the contrary notwithstanding, the permittee shall not be deemed to have violated this permit if and to the extent that such violation is caused by trials or experiments in connection with pollution control, provided that IP shall have given EPA 10 days' prior written notice of the nature and time of any such trial or experiment and EPA shall have given written approval for the trial or experiment prior to its commencement.

18. *Alternate Power Supply.* The permittee shall provide by April 1, 1975 an alternate source of power to operate all waste treatment facilities or indicate, in writing to the Regional Administrator, that production shall be controlled or the discharge shall be handled in such a manner that, in the event the primary source of power to the waste treatment facilities fails, any discharge into the receiving waters will comply with the limits set herein. This alternate power supply, whether from a generating unit located at the plant site or purchased from an independent producer of power, must be separate from the existing power source used to operate the waste treatment facilities and must be operational at the time construction of the treatment facilities has been completed. If a separate facility located at the plant site is to be used, the permittee shall certify in writing to the Regional Administrator and to the State Agency when the facility is completed and prepared to generate power.

19. *Bypass Provision.* There shall be no bypass of the waste treatment facilities which would allow the entry of untreated or partially treated wastes to the receiving waters.

20. *Authorized Signature for Reporting Requirements.* All reports required to be submitted by a corporation must be signed by a principal executive officer of at least the level of vice president, or his duly authorized representative, if such representative is responsible for the overall operation of the facility from which the discharge described in the application form originates. In the case of a partnership or a sole proprietorship, all reports must be signed by a general partner or the proprietor respectively. In the case of a municipal, State, Federal or other public facility, the application must be signed by either a principal executive officer, ranking elected official or other duly authorized employee.

21. The United States Army Corps of Engineers conducts maintenance dredging of navigable waters and their tributaries pursuant to certain federal statutes. The permittee should be aware of its possible responsibilities under the maintenance dredging program. Under these laws, any person, firm or other entity discharging suspended solids into a navigable waterway of the United States, or tributary thereof, which contribute to the necessity for maintenance dredging of that waterway may be required to participate in the maintenance dredging program.

Definitions

Regional Administrator: Regional Administrator
Region II
Environmental Protection Agency
26 Federal Plaza
New York, New York 10007
Attn:
Permits Administration Branch

State Certifying Agency: Director
Bureau of Industrial Wastes
Pure Waters Program
New York State Department of
Environmental Conservation
50 Wolf Road
Albany, New York 12201

Daily—each day on which the production facility is operating.

Weekly—One day during a calendar week (ordinarily the same day each week) and a normal operating day.

Monthly—One day during a calendar month (ordinarily the same day each month) and a normal operating day. (i.e. the 2nd Tuesday of each month)

Daily Average—the total discharge by weight or in other appropriate units as specified herein, during a calendar month divided by the number of days in the month that the production or commercial facility was operating. Where less than daily sampling is required by this permit, the daily average discharge shall be determined by the summation of all the measured daily discharges in appropriate units as specified herein divided by the number of days during the calendar month when the measurements were made.

Daily Maximum—the total discharge by weight or in other appropriate units as specified herein, during any calendar day.

Net—the amount of a pollutant contained in the discharge measured in appropriate units as specified herein, less the amount of a pollutant contained in the surface water body intake source, measured in the same units, over the same period of time.

1. The intake source must be the same water body that is being discharged to.

2. In cases where the surface water body intake source is pretreated for the removal of pollutants, the intake level of a pollutant to be used in calculating the net, is that level contained after the pretreatment stops.

Composite—a combination of individual (or continuously taken) samples obtained at regular intervals over the entire discharge day. The volume of each sample shall be proportional to the discharge flow rate. For a continuous discharge, a minimum of 24 individual grab samples (at hourly intervals) shall be collected and combined to constitute a 24-hour composite sample. For intermittent discharges of 4-8 hours duration, grab samples shall be taken at a minimum of 30 minute intervals. For intermittent discharges of less than 4 hours duration grab samples shall be taken at a minium of 15 minute intervals.

Gross—the poundage contained in the discharge. (Gross applies when the intake source is a municipal or private water supply, ground water, or a surface water body other than the one being discharged to.)

Grab—An individual sample collected in less than 15 minutes.

This permit and the authorization to discharge shall be binding upon the permittee and any successors in interest of the permittee and shall expire at midnight on December 31, 1979. The permittee shall not discharge after the above date of expiration. In order to receive authorization to discharge beyond the above date of expiration, the permittee shall submit such information, forms, and fees as are required by the agency authorized to issue NPDES permits no later than 180 days prior to the above date of expiration.

By authority of

GERALD M. HANSLER, P.E.

.....

(Regional Administrator)

November 18, 1974

MEYER SCOLNICK

.....

(Signature)

Meyer Scolnick
Director
Enforcement and Regional Counsel
Division

Exhibit C to Dolloff Affidavit

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY

(Letterhead omitted)

March 15, 1977

T.C. Payne
Vice President, Environmental Quality
International Paper Company
P.O. Box 16807
Mobile, Alabama 36616

Re: International Paper Company
Ticonderoga Mill, New York
NPDES Permit Nos. NY 000 4413 and
NY 0020036

Dear Mr. Payne:

The above-referenced National Pollutant Discharge Elimination System permit requires the discharge identified and authorized therein to meet the final effluent limitations contained in the permit by July 1, 1977. This date for attainment of final effluent limitations is specified in section 301(b)(1) of the Federal Water Pollution Control Act (the Act). Section 301(b)(1) of the Act and subsequent decisions of the Administrator of the Environmental Protection Agency and Federal Courts prevent a permit issued pursuant to section 402 of the Act from embodying a compliance schedule which requires achievement of final effluent limitations later than July 1, 1977.

The above-referenced permittee has submitted documentation, including a critical path construction management analysis, intended to establish that it cannot, despite all reasonable best efforts, achieve the final effluent limitations

for Total Suspended Solids (TSS) and Total Phosphorous required by the permit by July 1, 1977.

After review and evaluation of the material submitted, EPA has determined that in the exercise of its prosecutorial discretion, the compliance schedule contained in the permit notwithstanding, it will not take action against the permittee under section 309 of the Act with respect to the permittee's failure to achieve the final effluent limitations for TSS and Total Phosphorous by July 1, 1977.

EPA will exercise its prosecutorial discretion as indicated above only so long as the permittee complies with all of the following conditions and requirements:

1. The permittee shall comply with the following schedule for the attainment of final limitations on TSS and shall report to both the Regional Administrator and the State Agency on or before each date on the schedule detailing its compliance with the schedule date and requirement:

a. Commencement of Pilot Study by December 1, 1976;

b. Completion of Pilot Study by October 1, 1977;

c. Submission of critical path analysis for attainment of operational level for TSS by November 1, 1977. Such a submission may detail a schedule by which the attainment of the final TSS limitations would be achieved prior to October 1, 1979, depending on the results of the completed Pilot Study. In no event may the submission call for attainment of the final TSS limitations at a later date than October 1, 1979;

d. Submission of an approvable engineering report based on Pilot Study and identifying components of tertiary system by November 1, 1977;

e. Submission of approvable final plans and specifications by March 1, 1978;*

f. Commencement of construction by May 1, 1978;

g. Submission of a report on the progress of construction of its facilities by September 1, 1978;

h. Submission of a report on the progress of construction of its facilities by January 1, 1979;

i. Submission of a report on the progress of construction of its facilities by May 1, 1979;

j. Completion of construction by September 1, 1979;

k. Attainment of operational levels for TSS by October 1, 1979.

2. Pursuant to the permittee's submission referenced above and in accordance with agreements previously reached, the permittee shall, during the period from October 1, 1977 through October 1, 1979, attain interim limitations on TSS which represent EPA Guidelines for this industry, as follows:

Daily Average 7,779 Kg/day (17,150 lbs/day)
Daily Maximum 14,402 Kg/day (31,750 lbs/day);

3. Following the completion of the Pilot Study on October 1, 1977, the permittee shall thereafter comply with the final effluent limitations on Total Phosphorous as contained in Condition 10(a) on Page 6 of the subject permit;

4. The permittee shall meet all of the terms and conditions of the permit, except as provided above;

---

* All reports, plans and/or specifications that propose new or modified waste treatment and/or disposal facilities must be approvable and signed, and sealed, by a professional engineer, licensed to practice in the State in which the facilities are to be built.

5. The permittee shall meet all of the terms and conditions of this Enforcement Compliance Schedule Letter.

EPA's exercise of prosecutorial discretion as indicated above will also continue only so long as conditions do not arise which warrant an emergency action under section 504 of the Act or modification of the permit.

The permittee is advised that this Enforcement Compliance Schedule Letter does not preclude the initiation of an action, pursuant to section 505 of the Act, by a third person other than EPA to enforce the permit's requirements to achieve the final effluent limitations by July 1, 1977.

This Enforcement Compliance Schedule Letter does not constitute a waiver with respect to or imply that EPA will not take appropriate enforcement action against the permittee for its failure to (1) achieve the final effluent limitations on and after July 1, 1977, if the permittee does not fully satisfy the conditions set forth above; or (2) fully comply with other applicable statutory, regulatory, permit or other legal requirements.

Unless previously revoked, the effectiveness of this Enforcement Compliance Schedule Letter shall terminate on the date specified above for achievement of the final effluent limitations.

Sincerely yours,

/s/ MEYER SCOLNICK
Meyer Scolnick
Director
Enforcement Division

International Paper Company hereby stipulates and agrees that it will comply with all of the conditions and requirements of this Enforcement Compliance Schedule Letter.

International Paper Company

By: /s/ Name Illegible

Enclosures

cc: Ms. Helen Lee
Regional Hearing Clerk

Mr. William Garvey, Director
Bureau of Standards and Compliance
New York State Department of
Environmental Conservation
50 Wolf Road
Albany, New York 12233

James W.B. Benkard, Esq.
Davis Polk & Wardwell
1 Chase Manhattan Plaza
New York, New York 10005

Hon. Greg E. Studen
Assistant Attorney General
State of Vermont
109 State Street
Montpelier, Vermont 05602

Peter S. Paine, Jr., Counsel
Lake Champlain Committee
1 State Street Plaza
New York, New York 10004

Response of Environmental Conservation Agency of the State of Vermont to Defendant's Questionnaire

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF VERMONT

Civil Action—File No. 78-163

HARMEL OUELLETTE and LILA OUELLETTE, CLIFTON BROWNE and EDLA BROWNE, ALDEE PLOUFFE and SHIRLEY PLOUFFE, individually, on behalf of themselves, and on behalf of all similarly situated plaintiffs,

and

H. VAUGHN GRIFFIN, SR., ARDATH GRIFFIN, ALAN THORNDIKE and ELLEN THORNDIKE, WESLEY C. LARRABEE and VIRGINIA LARRABEE, F. ALFRED PATTERSON, JR., and LOIS T. PATTERSON,

Plaintiff-Intervenors,

v.

INTERNATIONAL PAPER COMPANY.

QUESTIONNAIRE TO CLASS MEMBERS

To: All owners and long-term lessee of lakefront property in the Towns of Addison (south of the Crown Point Bridge), Shoreham and Bridport

1. Do you engage in recreational activities involving the South Lake?

X Yes — No

See Note Attached.

2. What activities do you engage in? (Check the box)

X swimming — *See Note Attached.*
X water skiing
X fishing
X boating
other (specify)

3. Does your recreational activity take place in any particular area of the lake?

X Yes — No

4. If you answered yes to question 3, what areas of the lake do you use?

	Ticonderoga Area		Larabees Point
	Kerby Point		Watch Point
	Five Mile Point		Lapans Bay
	Yellow House Point		Plummies Point
X	Chimmney Point		North of Crown Point

5. What amount of time per year do you reside on the South Lake?

	Year-round	
X	Seasonal (Name the season)	*Summer.*
	Other (explain)	*See Attacheu Note.*

6. Approximately how frequently do you engage in recreational activity on the lake?

X	daily		2 to 4 times a week
	3 or 4 times a month		1 or 2 times per season

7. In your view, is the quality or condition of the water the same up and down the South Lake?

X Yes No

8. If your answer to question 7 is "No", please explain your reasons for that view.

9. What use do you make of your property on the South Lake?

1st residence
2d residence
camp
X other *See attached note.*

10. If you are a lessee of lakefront property what is the length of your lease?

5-10 years *N/A.*
10-20 years
over 20 years

11. Have you ever tried to sell your property?

Yes X No

12. Did your contemplated sales price exceed the amount that you paid for the property?

N/A.

Yes No

13. When did you purchase your lakeshore property?

9/19/68.

14. How many feet of lakefront property do you own in the Towns of Addison (south of the Crown Point Bridge), Bridgport and Shoreham?

2,970 feet.

15. Are there any other comments you would like to make about the effect, if any, of the discharge from the International Paper mill on the South Lake? If so, please use the space below. *See Attached Note.*

Dated: Sept. 23, 1981

Mr. Leo C. Laferriere, Commissioner Agency of Environmental Conservation Dept. of Forests, Parks & Recreation

/s/ Leo Laferriere

.....

Name (please print)

Respectfully submitted,

DINSE & ALLEN
College Street
Burlington, Vermont

DAVIS POLK & WARDWELL
1 Chase Manhattan Plaza
New York, New York 10005

Attached Note.

Further explanation of questions 1, 2, 5, 9, and 15.

The Department of Forests, Parks and Recreation is a part of the Vermont Agency of Environmental Conservation. The land we own at the Chimney Point Bridge was purchased for future development as a state park. The development potential for this property indicates swimming, water skiing, fishing, boating and other water contact recreational activities. The State Park system is basically a seasonal operation. A day use facility of this type would normally operate from Memorial Day weekend to Labor Day weekend. The Department of Water Resources of this Agency reports that "the IPCo-discharge is currently well within the stringent permit limits established by the State of New York. Based on Vermont's review of the discharge monitoring reports and Vermont's limited sampling of the south lake area, the Water Resources Department would conclude that the effects of the present discharge on the Lake are minimal."

Order

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF VERMONT

Civil Action—File No. 78-163

HARMEL OUELLETTE and LILA OUELLETTE, CLIFTON BROWNE and EDLA BROWNE, ALDEE PLOUFFE and SHIRLEY PLOUFFE, individually, on behalf of themselves, and on behalf of all similarly situated plaintiffs,

and

H. VAUGHIN GRIFFIN, SR., ARDATH GRIFFIN, ALAN THORNDIKE, ELLEN THORNDIKE, WESLEY C. LARRABEE, VIRGINIA LARRABEE, F. ALFRED PATTERSON, JR., and LOIS T. PATTERSON,

Plaintiff-Intervenors

v.

INTERNATIONAL PAPER COMPANY

ORDER

Upon consideration of the Motion to Allow Appearance and to Strike Request for Exclusion filed by the State of Vermont on March 8, 1983, and the memorandum and Affidavit in support thereof, it is hereby ORDERED:

That said motion be, and the same hereby is, granted. The appearance of the Attorney General of the State of Vermont for the State of Vermont, Department of Forests and Parks, shall be allowed and the request for exclusion previously filed on behalf of the Department of Forests and Parks shall be stricken.

Dated at Burlington in the District of Vermont, this 23rd day of March, 1983.

/s/ ALBERT W. COFFRIN
Albert W. Coffrin
Chief Judge

Letter of Langrock Sperry Parker & Wool to Second Circuit

LANGROCK SPERRY PARKER & WOOL

(Letterhead omitted)

September 25, 1985

Elaine B. Goldsmith, Clerk
UNITED STATES COURT OF APPEALS
Second Circuit
United States Courthouse
Foley Square
New York, New York 10007

Re: *Ouellette* v. *International Paper Company*
Docket No. 85-7506

Dear Clerk Goldsmith:

The enclosed case, *State of Tennessee* v. *Champion International Corporation*, 22 Env't Rep. Cas. (BNA) 1338 (Tenn. Ct. App. 1985), *appeal granted*, (Tenn. 1985), has come to the attention of Plaintiffs-Appellees. Pursuant to Fed. R. App. P. 28(j), it is hereby brought to the attention of this Court and the parties, in support of Plaintiffs-Appellees Argument I, pp. 13-31, that neither the Federal Water Pollution Control Act nor the United States Supreme Court decisions in *Illinois* v. *Milwaukee I & II*, preclude private nuisance actions in the Court of the state of injury.

Enclosed also are remarks of Senator Stafford entered in the Congressional Record on September 12, 1985 (S11305) setting forth legislative history in the form of excerpts from transcripts from the mark ups during 1970 and 1971 of the Clean Air Act and The Clean Water Act. Enclosed with the remarks of Senator Stafford are the transcripts from which he quotes.

These authorities are being submitted in support of Plaintiffs-Appellees' argument at page 29 of their brief that Congress intended the saving clause of the Federal Water Pollution Control Act to preserve rights already enjoyed by citizens.

Very truly yours,

/s/ EMILY J. JOSELSON, ESQ.
Emily J. Joselson, Esq.

EJJ/pm
Encl.

cc: James W. B. Benkard, Esq. w/encl.
Spencer R. Knapp, Esq. w/encl.
Frederick deG. Harlow, Esq. w/encl.
Meredith Wright, Esq. w/encl.
John G. Proudfit, Esq.

CONGRESSIONAL RECORD—SENATE
REMARKS OF SENATOR STAFFORD

S11305

POLLUTION LAWS PRESERVED RIGHTS

September 12, 1985

MR. STAFFORD. Mr. President, it is my custom to avoid issues which are in litigation, not embrace them. But to every rule there are exceptions.

There is now pending before the Second Circuit Court of Appeals a review of the decision by the U.S. District Court for Vermont in the case of *Ouellette* v. *International Paper*, 602 F. Supp. 264 (1985). One of the issues in that case is whether the enactment of the Federal Clean Water Act extinguished rights of action under other laws, including Vermont common and statutory law. Why the question should arise at all is a puzzle to this Senator since the language of the Clean Water Act is quite clear on the subject. Section 505 of the Clean Water Act establishes the right of a citizen to sue to enforce the provisions of the act, then states explicitly that other rights are undisturbed. Subsection (e) states that—

(e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

Despite this clear language, at least one court has held that the act extinguishes some State common law. That court is the Seventh Circuit Court of Appeals, which made such a finding in *Illinois* v. *City of Milwaukee*, 731 F. 2d 403 (1984).

My purpose here is not to review the details of these and other court decisions, but to make available some legislative history which I hope will be helpful in indicating just what was intended by the Congress. This legislative history includes transcripts from the markups during 1970 and 1971 of the Clean Air Act and Clean Water Act.

The citizen suit provision was first adopted in the Clean Air Act and then, about 1 year later, incorporated in the Clean Water Act. Therefore, to completely understand what the members of the Committee on Public Works and the Congress intended, it is necessary to review transcripts and other documents relating to both laws.

The subject of preempting or displacing rights available under other laws arose for the first time on June 4, 1970, at a meeting of the Subcommittee on Air and Water Pollution. The subcommittee was meeting to mark up what was later to become the Clean Air Act. Included in the bill before the subcommittee was a proposal to authorize citizens to file suit to force compliance with pollution control requirements. As the subcommittee members were discussing this proposal, Senator Howard Baker offered an observation and expressed a fear as follows:

SENATOR BAKER. The only question is whether or not you have access to the Federal courts under one of the jurisdictional requirements for diversity or jurisdictional amount or one of the other specialities. So we aren't creating a brand new cause of action. We are, rather, modifying one that already exists.

I think that brings to mind something that we should make sure we fully understand: that is, that we don't limit and circumscribe the right of citizens individually and as a class to do what they can already do by spelling it out here in this statute. If we start spelling out each detail here, the court is going to hold that we have obliterated everything else that the common law created. (Transcript Roll 15, p. 1687.)

The discussion then moves on to other subjects, but a minute or two later, Senator Baker suggests that the bill be amended.

SENATOR BAKER. I think you could also put in a saving clause to the effect that:

"Nothing contained in this Act shall abridge or abrogate any pre-existing right by statute or common law."

I think the courts would permit that. (Transcript Roll 15, p. 1692.)

The transcript shows no direct response to Senator Baker's suggestion at this time, but on July 29, 1970, the subcommittee was meeting again to mark up the proposed Clean Air Act. Senator Baker was absent, but there was a discussion of the meaning of the savings clause:

SENATOR COOPER. If I may ask another question . . . what would be embraced in equitable relief? (Would it affect) any personal rights you may have as a person, for damages.

MR. JORLING. The intention in the language, as I understand it, is to specifically avoid any damage provisions. It is strictly an equitable provision to abate, to halt, to prevent this violation from occurring, and does not address itself to either physical or monetary damages in any way. It is strictly an action to achieve this abatement, if found, of a violation of the schedule of compliance and emission stand (sic) or emission requirement.

It does not go to the issue of damages at all, and that comes out, I think, of the whole philosophy of the Act, and that is, it is very difficult for anybody to prove personal or monetary damage resulting from the effects of air pollution.

MR. BILLINGS. We have reserved the rights of citizens under other common law to seek damages for pollution, if such damages occur. (Transcript Roll 16, p. 0080-81.)

The two staff members responding to the questions from Senators Cooper and Spong were Leon G. Billings and Thomas Jorling. Mr. Billings, who was not a lawyer, was staff director of the Subcommittee on Air and Water Pollution and Senator Muskie's principal aide. Mr. Jorling, a lawyer, was minority counsel to the full committee and the principal aide to the Republican members.

The transcripts contain one further reference to the savings clause, which is a statement by Senator Spong of Senator Baker's original intent. The Members were discussing whether citizens should be required to provide notice to administrative agencies as a precondition to filing suit. There had been earlier subcommittee discussions, and the members were attempting to refresh their recollections, with Senator Muskie observing at one point, "* * * we have gone through this once before. I forget just how we resolved it." (Transcript Roll 16, p. 0088.) Senator Spong recalls the following:

SENATOR SPONG. It is coming back to me now. Senator Baker's concern was that we could be taking a right away from a citizen . . . to go into court. . . . (Transcript Roll 16, p. 0090.)

Following subcommittee and committee markup, the bill was considered by the full Senate on September 21, 1970. As it had in the earlier stages of the legislative process, floor attention focused almost exclusively on the consequences of conferring on citizens an explicit right to sue to enforce pollution laws. Senator Philip Hart of Michigan defended the provision, which was by then section 304 of S. 4358, as "one of the most attractive features of the bill," adding that it would not result in a proliferation of litigation.

The bill makes no provision for damages to the individual. It therefore provides no incentives to suit other than to protect the health and welfare of those suing and others similarly situated. It will be the rare, rather than the ordin-

ary, person, I suspect, who, with no hope of financial gain and the very real prospect of financial loss, will initiate court action under this bill.

(Legislative history of the Clean Air Act Amendments of 1970, Congressional Research Service, Library of Congress, Washington, D.C., Volume 1, p. 355.)

Senator Hart's remarks, together with the transcripts of the markups, make it clear that Senators believed that, in enacting the Clean Air Act, they were supplementing remedies available to injured parties, not supplanting them.

The House bill contained no comparable citizen suit provision. But with some changes in the Senate language, the House receded. The last sentence of the Statement of Managers on Part of the House in explanation of the section 304, the citizens' suit provision, was the following:

The right of persons (or class of persons) to seek enforcement or other relief under any statute or common law is not affected. (Id. at p. 206.)

During consideration of the Clean Water Act the following year, much less attention focused on the citizens' suit provision. That is due, in part, to the fact that the version contained in the Clean Water Act was identical to what had been enacted in the Clean Air Act, except for changes required because of differences in terminology—for example, discharges of water pollution effluent vice emissions of air pollution.

At this time, several bills were pending in the Congress to expand the rights of citizens to file class action suits. Therefore, some discussion concerned itself with the issue of whether the parenthetical phrase "(or class of persons)" might have the effect of expanding the then current law. On September 21, 1971, the Committee on Public Works held a markup of the proposed Clean Water Act amendments which had been reported by the Subcommittee on Air

and Water Pollution. During the review of the citizens' suit provision, the following exchange took place:

SENATOR COOPER. Do you want to tell us against whom action may be brought and for what causes and then exceptions? Then on page 115, subsection e, you add, "Nothing shall restrict any right which any person (or class of persons) . . .". Is the right of a class of persons only available under the conditions set out in e, in other words, when they have a right under State statute or common law?

MR. MEYER. Well, it is a parenthetical phrase.

MR. JORLANG (sic). The intention is, as in the Air Bill, to avoid in this provision any of the complexities that are raiesed with cross-action (apparently class-action) suits on the basis that this is a provision that authorizes only equitable relief. There is no provision for the recovery of damages nor for requirement of showing of damages.

The provision, subsection e, provides merely that this section, the authorization granted in this section, in no way affects any rights a person has, whether or not acting alone or as a class, under any other law, statutory or common, for relief against a pollutor (sic). This would normally mean that if there are some damages, standard common law damages, and a person would like to join with a class of people that suffered similar damage, this does not prevent them from doing so. (Transcript Roll 17, p. 1617-18.)

This understanding of the savings clause was also reflected in the committee report accompanying S. 2770, which explained what was to become section 505(e) as follows:

It should be noted, however, that the section would specifically preserve any rights or remedies under any other law. Thus, if damages could be shown, other remedies would remain available. Compliance with requirements under this Act would not be a defense to a common law action for pollution damages. (Legislative History of the

Water Pollution Control Act Amendments of 1972, Congressional Research Service, Library of Congress, Washington, D.C., p. 1499.)

The issue of what impact, if any, the enactment of the Clean Water Act would have on the availability of other statutory or common law remedies was apparently not discussed further. However, it would seem that further discussion was unnecessary. From the first mention of the issue by Senator Baker during the subcommittee markups of the Clean Air Act to the last recorded mention of the subject in the Senate Public Works Committee report on the Clean Water Act, the attitude and intent of the members was remarkably consistent. Not once was there ever any doubt as to what they intended or disagreement as to its correctness. In every discussion of the matter, it was clear that all other rights—whether State or Federal, statutory, or common law—were to be preserved. The clarity of the repeated statements to this effect and the unanimity of agreements on the proposition made further discussion meaningless.

I might observe that this Senator was a Member of the other Chamber when the Clean Air Act amendments were adopted and a member of the Senate Committee on Public Works when the Clean Water Act amendments were considered and approved. Speaking only for himself, this Senator can recall no occasion on which it was ever suggested at the time of their consideration that the enactment of the Clean Water Act or the Clean Air Act would diminish the rights of injured parties. On the other hand, I can find a record replete with unequivocal statements by Members and staff that these rights were to be preserved, combined with clear indications of affirmation and agreement by other Senators and Representatives.

In the face of a record such as this, it seems impossible for any reasonable person to conclude that the Congress

intended, by the enactment of these laws to provide the public with less protection from personal injury than it had before. Such a conclusion is directly at odds with every statement made during the long and detailed consideration of these laws. Nevertheless, some persons apparently have reached such a conclusion in the past. I would hope that in light of the information I have just provided, they will reconsider and correct earlier decisions.

Mr. President, the complete transcripts to which I have referred are available through the documents room of the Committee on Environment and Public Works should any person wish to review them.

Letter of Davis Polk & Wardwell to Second Circuit

DAVIS POLK & WARDWELL

(Letterhead omitted)

October 3, 1985

Hon. Elaine B. Goldsmith
Clerk
UNITED STATES COURT OF APPEALS
Second Circuit
United States Courthouse
Foley Square
New York, New York 10007

Re: *Ouellette* v. *International Paper Company, Docket No. 85-7506*

Dear Ms. Goldsmith:

On behalf of International Paper Company, defendant-appellant in the above-referenced appeal, we submit this letter in response to a letter dated September 25, 1985 submitted by plaintiffs-appellees to this Court. Plaintiffs-appellees' letter seeks to present two supplemental "authorities" for this Court's consideration. Pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure, we take this opportunity to respond to that letter.

First, plaintiffs-appellees cite an intermediate state court decision, *Tennessee* v. *Champion International Corp.*, 22 Env't Rep. Cas. (BNA) 1338 (Tenn. Ct. App. 1985), *appeal granted,* (Tenn. S.Ct. 1985), to support their view that the Federal Water Pollution Control Act ("FWPCA") authorizes actions involving interstate water pollution claims to be brought in the courts and under the common law of the state in which the alleged injury occurred. In *Champion,* the State of Tennessee brought suit in a Tennessee state court against a North Carolina paper plant, alleging that the plant's discharges into an interstate river flowing between Tennessee and North Carolina, constituted a nuisance under Tennessee law. The court held that the suit could be brought under Tennessee law.

Initially, we point out that the Tennessee Supreme Court has decided to exercise its discretion to grant an appeal to review the intermediate court's decision in *Champion.* Second, the intermediate court in *Champion* acknowledged that its holding was contrary to that of the Seventh Circuit in *Illinois* v. *Milwaukee,* 731 F.2d 403 (7th Cir. 1984), *as amended,* Nos. 77-2246 & 81-2236 (7th Cir. May 29, 1984), *cert. denied sub nom. Scott* v. *City of Hammond,* 53 U.S.L.W. 3529 (January 21, 1985) ("Illinois v. Milwaukee (III)"). As set forth more fully at pp. 15-30 of International Paper Company's Brief dated July 22, 1985 ("IPCo. Mem.") and at pp. 2-15 of its Reply Brief dated September 4, 1985 ("IPCo. Reply"), the holding of *Illinois* v. *Milwaukee* (III) and the position of the United States which fully supported the Seventh Circuit's ruling as amicus curiae on Illinois' subsequent petition for a writ of certiorari correctly interpret the FWPCA and should be followed in this case.

Finally, there is a sharp factual distinction between the *Champion* decision and the case at bar: in *Champion,* the complained of pollutants—dissolved solids, foam, odor and color—were not regulated by North Carolina, the state of discharge, while Tennessee, the state where the alleged harm occurred, regulated those pollutants. By contrast, in the case at bar, there has been no allegation that International Paper Company is discharging pollutants not regulated under New York law or its federal permit that would be subject to regulation under Vermont law.

The second source submitted by plaintiffs-appellees for consideration by this Court consists of certain remarks by

Senator Stafford from Vermont entered in the Congressional Record on September 12, 1985 commenting explicitly on this appeal and urging that this Court interpret the FWPCA to permit plaintiffs-appellees (comprised of Vermont citizens and the State of Vermont) to maintain this action in a Vermont court under Vermont law. According to Senator Stafford, the legislative histories of the Clean Air Act ("CAA") and the FWPCA makes it "clear that all other rights-whether State or Federal, statutory, or common law-were to be preserved." 131 Cong. Rec. S11306 (Sept. 12, 1985).

Senator Stafford's personal view of the legislative histories of the CAA and FWPCA, which were enacted respectively fifteen and thirteen years ago, are not entitled to any weight by this Court in accordance with the well-established principle that:

> "post-passage remarks of legislators, however explicit, cannot serve to change the legislative intent of Congress expressed before the Act's passage. . . . Such statements represent only the personal views of these legislators, since the statements were made after passage of the Act." *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974); *Goolsby* v. *Blumenthal*, 581 F.2d 455, 460 (5th Cir. 1978), *cert. denied sub nom. Goolsby* v. *Miller*, 444 U.S. 970 (1979). *See also United States* v. *Clark*, 445 U.S. 23, 33n.9 (1980) ("the views of some Congressmen as to the construction of a statute adopted years before by another Congress have very little, if any, significance").

Senator Stafford has sought unsuccessfully on two prior occasions to amend the savings clause of the FWPCA to enact into law what he asserts in his remarks quoted by

plaintiffs-appellees *is* the existing law, as supposedly shown in the legislative history. Both bills proposed to permit expressly the application of the "law of the state in which [the plaintiff] resides or the State in which the claim arose" in cases involving water pollution. Those bills were submitted in 1983 and in 1985, after the decision in *Illinois* v. *Milwaukee* (III). The 1983 bill was not enacted by the Congress and the 1985 bill was amended in the Committee on Environment and Public Works of the United States Senate to expressly delete the language proposed by Senator Stafford. Senator Stafford is the chairman of the Committee on Environment and Public Works.

Finally, examination of the legislative history cited by Senator Stafford does not support his interpretation of the FWPCA. The cited excerpts support International Paper Company's position that the savings clauses of the FWPCA merely preserve, not create, state law that existed when the FWPCA was enacted. For example, Senator Baker stated that the CAA savings clauses should preserve "any preexisting right by statute or common law." Comments of Senator Baker before Subcommittee on Air and Water Pollution (June 4, 1970), *reprinted in* 131 Cong. Rec. S11305 (Sept. 12, 1985). As more fully set forth in IPCo.'s Mem. at pp. 16-23 and IPCo.'s Reply at pp. 10-12, *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938) and *Illinois* v. *Milwaukee*, 406 U.S. 91 (1972), establish that at the time of passage of the FWPCA, as well as the CAA, an action could not be brought under state law to redress alleged interstate pollu-

tion. Thus, there were no "pre-existing" common law rights that could be "saved" by the FWPCA savings clauses.

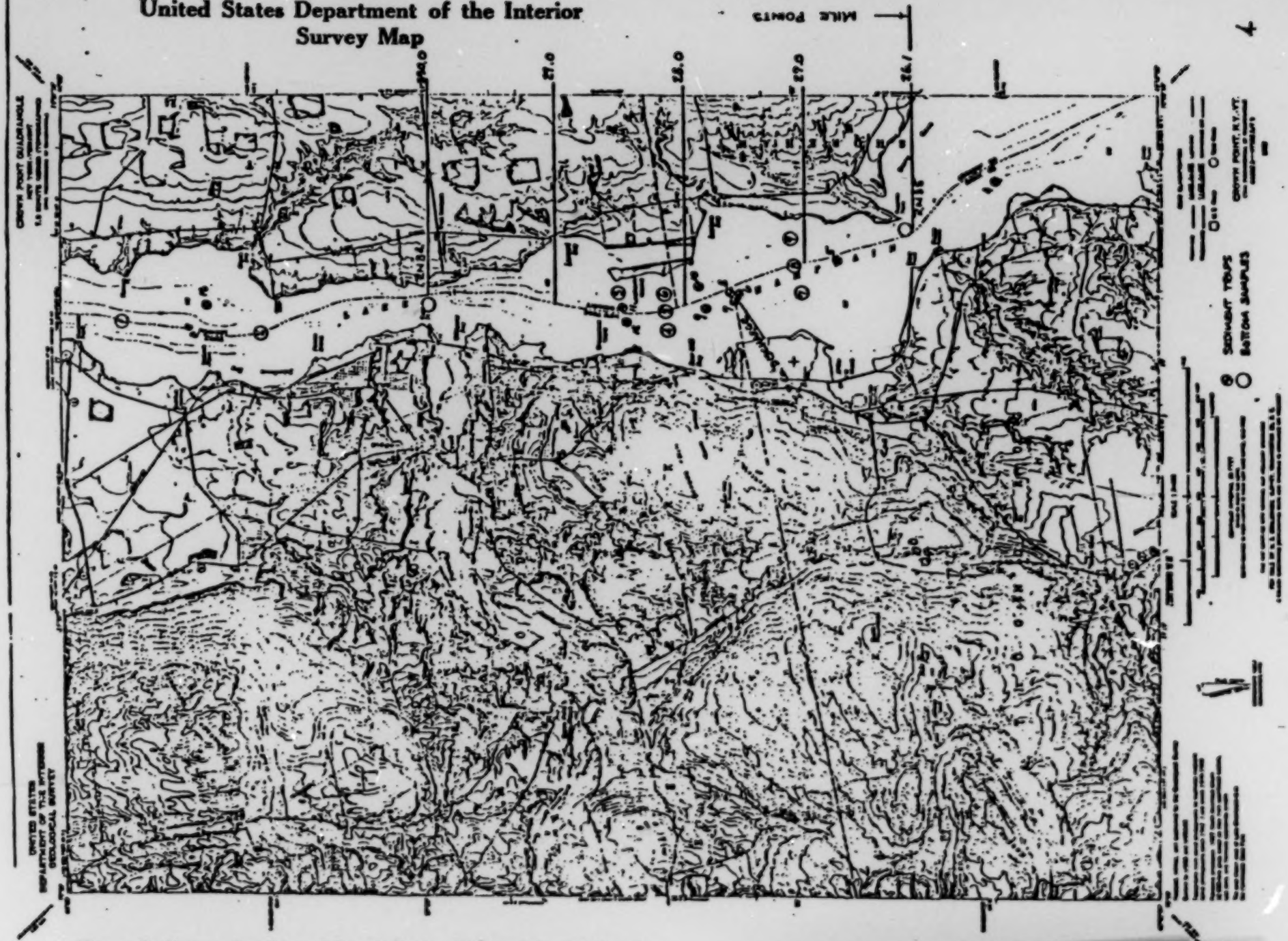
Respectfully submitted,

JAMES W.B. BENKARD
DAVIS POLK & WARDWELL
1 Chase Manhattan Plaza
New York, New York
Tel: (212) 530-4000

Attorneys for Defendant-Appellant International Paper Company

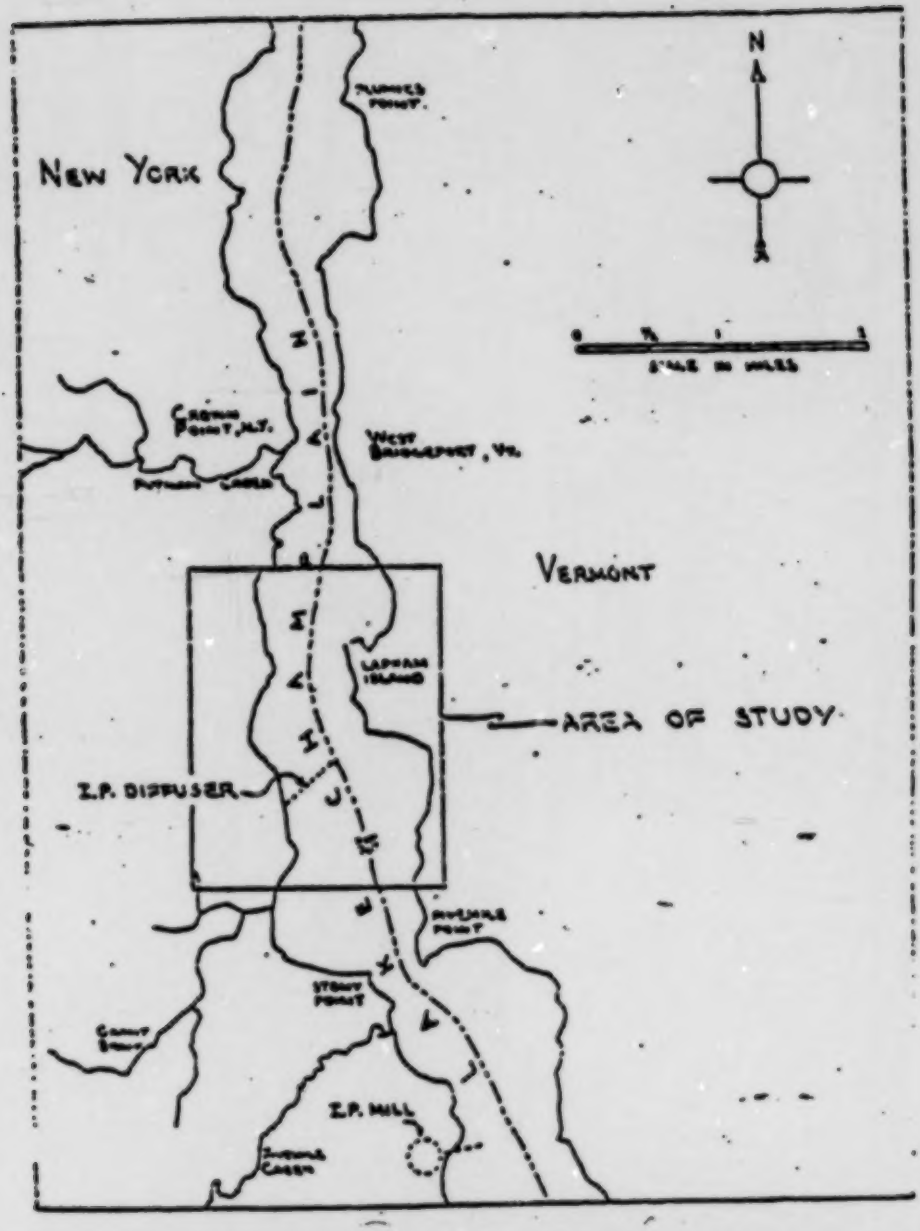
cc: Emily J. Joselson, Esq.
Merideth Wright, Esq.
Frederick deG. Harlow, Esq.

United States Department of the Interior Survey Map



From *Sediment Studies of South Lake Champlain*, Richard Haupt, p. 4 (1976). Produced by defendant in response to plaintiffs' interrogatories on January 11, 1980.

Location Map



From *Performance of Waste Treatment Facilities at International Paper Company's "New Mill" at Ticonderoga, N.Y.*, Hydroscience, Inc., Figure 1 (1972). Produced by defendant in response to plaintiffs' interrogatories on January 11, 1980.